

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

_____)	
PAMELA M. STRICKLAND, Appellant)	
)	
and)	Docket No. 06-160
)	Issued: February 9, 2006
DEPARTMENT OF AGRICULTURE, FARM)	
SERVICE AGENCY, Kansas City, MO,)	
Employer)	
_____)	

Appearances:
Robert L. Jones, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
 DAVID S. GERSON, Judge
 MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 1, 2005 appellant, through her representative, filed a timely appeal from a November 19, 2004 merit decision of the Office of Workers' Compensation Programs, denying her claim for an emotional condition, an August 1, 2005 hearing representative's decision, affirming the denial of her emotional condition claim and an October 12, 2005 merit decision, denying modification of the denial of her claim. 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 in the performance of duty.

FACTUAL HISTORY

On August 30, 2004 appellant, then a 53-year-old property specialist, filed an occupational disease claim alleging that she sustained physical and psychological problems causally related to factors of her federal employment. She stopped work on March 17, 2004.

Appellant referenced attachments with her claim but submitted no additional factual information.¹

By letter dated October 18, 2004, the Office requested that she submit additional factual and medical evidence in support of her claim.

In a statement dated October 28, 2004, an official with the employing establishment indicated that appellant was reassigned to a new position on February 22, 2004 but stopped work after one month and retired on August 30, 2004.

By decision dated November 19, 2004, the Office denied appellant's claim on the grounds that she did not establish an injury as alleged.

On November 25, 2004 appellant requested an oral hearing before an Office hearing representative. At the hearing, held on April 19, 2005, appellant indicated that she experienced constant harassment from her supervisor, Dorothy Malone. She noted that as part of an Equal Employment Opportunity (EEO) settlement she was assigned to Ms. Malone's section and promised promotions. Appellant stated that after Ms. Malone found some records misfiled she became angry and denied her promotion. Ms. Malone also moved her from a seat by the window. She later realized that the problem with the records was not appellant's fault, but continued to deny her a promotion "because she could." Appellant noted that she filed an EEO complaint against a prior supervisor for sexual harassment and that subsequent to the settlement she was reassigned. She alleged that her next supervisor separated light-skinned and dark-skinned employees. The hearing representative informed appellant that she had not submitted evidence in support of her claim. Her representative questioned why the Office had no information that the "word nigger was used on the job, in reference to [her]." He also indicated that appellant had won all of her EEO complaints. The hearing representative explained the need to submit information substantiating her allegations.

Appellant submitted a settlement agreement dated September 1, 2004 in which the employing establishment provided that she could retire August 31, 2004 and paid her \$5,000 in physical and emotional damages and attorney's fees of \$10,000.00. The agreement stipulated that it did not constitute "an admission of guilt, fault or wrongdoing by either party."

In a statement dated and received May 24, 2005, an official with the employing establishment related that appellant's EEO complaints were settled without any discrimination finding and denied knowledge of the racial slur as alleged by her representative.

By decision dated August 1, 2005, the hearing representative affirmed the Office's November 19, 2004 decision, finding that appellant had not established any compensable employment factors.

On August 12, 2005 appellant, through her representative, requested reconsideration of her claim. She submitted a resolution agreement dated February 9, 2004 in which the employing establishment reduced appellant's 14-day suspension to a 7-day suspension and changed the

¹ Appellant submitted medical evidence with her claim.

charge from insubordination to failure to follow instructions. The agreement further provided that appellant would be reassigned to Arthur Greene, her performance evaluation altered, sick leave restored and attorney's fees granted. The agreement stated that its terms "neither determines nor implies a finding of or admission that discrimination occurred."

In a final determination on an allegation of noncompliance dated July 21, 2004, an official found that the employing establishment complied with the terms of the February 9, 2004 settlement agreement.

Appellant further provided an undated prehearing statement from her attorney to the EEO Commission summarizing the anticipated testimony of various individuals from the employing establishment at the hearing. The representative listed the individuals' names and the specific events to which they would testify, including that Rick Bowan, a supervisor, spread rumors that appellant had an affair with a coworker, made inappropriate comments and charged her with being absent without leave (AWOL). He indicated that individuals would also testify that Ms. Malone erroneously charged appellant as AWOL, delayed her promotion and discriminated against light-skinned blacks.

By decision dated October 12, 2005, the Office denied modification of its prior decisions.

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 her specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.² 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 his or her frustration from not being permitted to work in a particular environment or to hold a particular position.³

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.⁴ However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.⁵ In determining whether the employing establishment has erred or acted abusively, the Board will

² 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁴ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

⁵ See *William H. Fortner*, 49 ECAB 324 (1998).

examine the factual evidence of record to determine whether the employing establishment acted reasonably.⁶

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.⁷ A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.⁸ The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.⁹ The primary reason for requiring factual evidence from the claimant is to support his or her allegations of stress in the workplace 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.¹⁰

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.¹¹ 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.¹²

ANALYSIS

Appellant attributed her emotional condition to harassment and discrimination by her supervisors. Specifically, she related that her prior supervisor sexually harassed her and that appellant's next supervisor, Ms. Malone, moved her from her window seat and denied her a promotion. Appellant also alleged that Ms. Malone treated light-skinned and dark-skinned employees differently. At the hearing, her representative asserted that she was called a racial

⁶ *Ruth S. Johnson*, 46 ECAB 237 (1994).

⁷ *See Michael Ewanichak*, 48 ECAB 364 (1997).

⁸ *See Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004); *Parley A. Clement*, 48 ECAB 302 (1997).

⁹ *See James E. Norris*, 52 ECAB 93 (2000).

¹⁰ *Beverly R. Jones*, 55 ECAB ____ (Docket No. 03-1210, issued March 26, 2004).

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

¹² *Id.*

epitaph at work. Appellant's representative further submitted an EEO prehearing statement alleging that various individuals would testify that appellant's supervisors racially and sexually discriminated against her and provided specific examples of the anticipated testimony.

The Board has held that actions of an employer which the employee characterized as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that the harassment or discrimination did in fact occur.¹³ Mere perceptions and feelings of harassment or discrimination will not support an award of compensation.¹⁴ In this case, appellant has not provided sufficient evidence to establish that she was harassed or discriminated against by her supervisors. She submitted an EEO settlement dated February 9, 2004 reducing a 14-day suspension to a 7-day suspension and changing the charge from insubordination to failure to follow instructions. Appellant also submitted a settlement agreement dated August 31, 2004 which allowed her to retire on August 31, 2004 and paid her \$5,000.00 in damages and \$10,000.00 for attorney's fees. Both agreements, however, specifically indicated that the terms of the agreement were not to be construed as an admission of fault by either party. The Board has held that the mere fact that personnel actions are later modified or rescinded does not, in and of itself, establish error or abuse on the part of the employing establishment.¹⁵ Moreover, the agreements are of limited probative value as they do not provide any description of the specific subject matter of the grievances that they settled.¹⁶ While appellant's representative submitted a prehearing statement purporting to summarize the anticipated testimony of various individuals at the employing establishment, the record does not contain any actual testimony or statements from these individuals or any statement by appellant outlining the subject matter of her grievances. A claimant must specifically identify the employment factors or incidents alleged to have caused her condition and establish a factual basis for her allegations with probative and reliable evidence.¹⁷ As appellant has not submitted any probative evidence in support of her allegation that her supervisors discriminated against her or that she was called a racial epitaph at work, she has not met her burden of proof to establish harassment or discrimination by her supervisors.

Regarding appellant's allegations that she was wrongfully denied a promotion, transferred due to her EEO settlement and removed from her seat at the window, the Board has held that, although the handling of promotions, the assignment of a workstation and matters involving transfers are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹⁸ An administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of

¹³ *Lori A. Facey*, 55 ECAB ____ (Docket No. 03-2015, issued January 6, 2004).

¹⁴ *Id.*

¹⁵ *Paul L. Stewart*, 54 ECAB 824 (2003).

¹⁶ *See Lori A. Facey*, *supra* note 13.

¹⁷ *Roger Williams*, 52 ECAB 468 (20010).

¹⁸ *Karen K. Levene*, 54 ECAB 671 (2003); *Hasty P. Foreman*, 54 ECAB 427 (2003); *Katherine A. Berg*, 54 ECAB 262 (2002).

the employing establishment.¹⁹ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²⁰ Appellant has not submitted sufficient evidence to show that the employing establishment committed error or abuse with respect to these matters. The EEO settlements do not contain a finding of fault or wrongdoing by the employing establishment or a description of the basis of the EEO grievances. Further, appellant's desire for a seat next to a window constitutes a desire to work in a particular environment and is not compensable under the Act.²¹ Thus, appellant has not established a compensable employment factor with regard to administrative matters.

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.²²

CONCLUSION

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 12 and August 1, 2005 and November 19, 2004 are affirmed.

Issued: February 9, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ *Id.*

²⁰ *Phillip L. Barnes*, 55 ECAB ____ (Docket No. 20-1441, issued March 31, 2004).

²¹ *Paul L. Stewart*, *supra* note 15.

²² As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. See *Debora L. Hanna*, 54 ECAB 548 (2003).