United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 07-1556**
	)	**Issued: January 28, 2008**
U.S. POSTAL SERVICE, VEHICLE MAINTENANCE FACILITY, Huntsville, AL, Employer	)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 21, 2007 appellant filed a timely appeal of the April 18, 2007 merit decision of the Office of Workers' Compensation Programs, which affirmed the denial of 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 the claim.

ISSUE

The issue is whether appellant sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On June 20, 2005 appellant, then a 51-year-old clerk, filed an occupational disease claim for stress, depression and anxiety. She stopped work on September 15, 2003. On the claim form appellant generally alleged that she had been insulted, verbally and mentally harassed and was denied training. She also claimed that she was retaliated against and sexually harassed by her

supervisor, Kenneth W. Fair. The alleged mistreatment began in January 2002 when appellant was assigned a rehabilitation position at the vehicle maintenance facility (VMF).[1] Mr. Fair allegedly made sexual advances and sexually-suggestive remarks. He also reportedly allowed other employees to insult and belittle appellant. Appellant claimed that she had been ridiculed for not being able to perform her job and told she was stupid. She also alleged that Mr. Fair punished her for not responding to his sexual advances.

Appellant submitted a November 18, 2003 report from Dr. R. Scott Hellard, a Board-certified psychiatrist, who had been treating her for anxiety and depression since May 2003. Dr. Hellard noted that appellant relayed to him that her transfer to VMF had been stressful and that much of her stress was related to the constant and unrelenting verbal abuse that she suffered from her supervisor. According to Dr. Hellard, appellant related numerous examples of how she felt singled out and harassed by her supervisor. He noted that on more than one occasion she reported that the supervisor had made sexual advances and that her rejection of these advances resulted in retaliation by the supervisor. Dr. Hellard indicated that appellant remained extremely fearful and paranoid of her workplace. He attributed her ongoing symptoms of depression and anxiety to the circumstances that arose at work following her transfer to VMF.

The employing establishment challenged appellant's claim noting, among other things, that her allegations of sexual harassment and retaliation had recently been dismissed by an administrative judge in a separate Equal Employment Opportunity (EEO) complaint.

In a July 13, 2005 statement, appellant's supervisor denied her allegations of sexual harassment. Mr. Fair stated that "[a]t no time did [he], or any personnel within the VMF, ever sexually harass [appellant]." He also stated that she never commented about anyone belittling or demeaning her. During appellant's year and a half tenure at VMF, she never informed anyone of any type of harassment. Mr. Fair indicated that he and appellant began having problems when he asked her to complete the necessary forms for Family and Medical Leave Act (FMLA) authorization. He also noted that he provided her with on-the-job training in various areas, such as filing work orders and using Microsoft Excel. Mr. Fair explained that appellant had difficulties performing these tasks correctly, which in turn caused scheduling problems and potential financial losses. He also indicated that, after her September 15, 2003 departure from VMF, she filed an EEO complaint against him for sexual harassment. According to Mr. Fair, professional mediators and federal judges found there was no merit to the charges.

The Office requested additional evidence from both appellant and the employing establishment. She was asked to provide a more recent physician's opinion. The Office also requested a specific account of the alleged incidents, including details as to when and where the events occurred, who was present and what was said and done. Appellant was also encouraged to provide any available evidence to support her allegations, such as witness statements and any final grievance or EEO findings. The Office also asked the employing establishment to provide full copies of all final EEO findings and documents regarding appellant's allegations. Neither party submitted the requested information within the allotted time frame.

[1] Appellant previously sustained an employment-related left shoulder injury on October 18, 2000 (File No. 06-2020419).

In a decision dated October 21, 2005, the Office denied appellant's claim because the evidence was insufficient to establish fact of injury. The Office noted that she had not submitted detailed and verifiable descriptions of the employment factors or incidents she alleged caused her medical disorder. Without full details and evidence regarding appellant's allegations, the Office was unable to make a finding that the incidents and factors occurred as alleged.

Within a few days of the decision, the Office received a packet of information from appellant that included additional medical records, a three-page statement and a June 21, 2005 EEO Commission decision. On November 17, 2005 appellant requested a review of the written record.[2]

In appellant's statement, she described several instances where she requested training and was denied. She indicated that, when she began work at VMF on January 26, 2002, she was initially responsible for computer data input. Appellant reportedly asked Mr. Fair for computer training and he told her there was no training. But Mr. Fair did demonstrate some basic computer functions for her. When appellant was later assigned data input duties on the vehicle maintenance accounting system (VMAS), he again denied her request for training. Instead of providing formal training, Mr. Fair assigned Ronnie Hall to explain how VMAS worked. Appellant stated that Mr. Hall was not particularly helpful and at times was verbally abusive. Another employee assigned to VMF in October 2002 received VMAS training, whereas appellant did not. Appellant also alleged that she was the only VMF employee who did not receive AVIS training. She explained that everyone assigned to VMF was put in some type of training except her. Appellant also complained about not receiving formal or on-the-job training when assigned additional duties such as maintaining information on hazardous materials, work hours, mileage and material safety.

Another incident allegedly occurred on July 1, 2003 when appellant became upset during a meeting with Mr. Fair and Fred Owens, the FMLA coordinator. Mr. Fair and Mr. Owens discussed with her the procedures for documenting and authorizing FMLA requests. Appellant was reportedly asked how long it would take her to bring in her medical excuse.

Appellant also accused both Mr. Fair and Mr. Hall of being verbally abusive. When Mr. Hall was assigned the task of explaining how VMAS worked, he allegedly criticized her and called her "dumb" and "stupid" whenever she asked a work-related question. He also allegedly told appellant that she could not learn anything. This pattern of verbal abuse continued anytime she and Mr. Hall were required to work together. Appellant claimed that she had spoken to Mr. Fair on several occasions about Mr. Hall's attitude and negative comments. Mr. Fair reportedly told her to get used to it because he was not going to say anything to Mr. Hall. Appellant similarly accused Mr. Fair of calling her stupid and telling her she was not smart enough to learn anything. This allegedly occurred when she was working on VMAS. Appellant also claimed that, between July and September 2002, Mr. Fair insulted her on many occasions. Mr. Fair's insults reportedly intensified in October and December 2002, and according to appellant Mr. Fair was "rude and just plain hateful" towards her.

[2] The Office hearing representative advised the employing establishment of appellant's hearing request, but it neglected to forward a copy of appellant's recent statement to the employing establishment for comment.

Appellant raised a number of additional issues regarding job assignments and allocation of office space. She alleged that Mr. Fair and Mr. Hall discussed how they would use her as a cleaning person, which she believed was beyond her physical limitations. Appellant also stated that Mr. Fair would make her paint, clean and take out the trash just to show her he was the boss. She claimed that Mr. Fair also made her go outside in the rain and put gas in the pick-up truck because he did not want to get wet. Appellant also objected to having one of her duties reassigned to another employee in October 2002. She took exception to Mr. Fair's September 15, 2003 decision to limit her access to VMAS.

Appellant noted that in March 2002, Mr. Hall told Mr. Fair to move her to the front office. She complained that the move occurred without her input. Another office move in July 2003 also did not meet with appellant's approval. Appellant stated that, upon returning to work on July 7, 2003, she found that her desk had been moved to the stockroom. The desk was reportedly placed in a dark corner in front of a supply cabinet. Because of the desk's location, appellant would have to move every time someone came into the stockroom for supplies.

According to appellant, all of the noted incidents of inadequate training, job and office reassignments, time and attendance disputes and verbal abuse occurred against the backdrop of pervasive and continuous sexual harassment by Mr. Fair. The harassment allegedly started on January 26, 2002, appellant's first day working at VMF. She stated that Mr. Fair started asking personnel questions that were inappropriate. Beginning in February 2002, Mr. Fair allegedly made unwanted advances that include rubbing appellant's shoulders, upper arms and her back. He also reportedly put his wet finger in her ear. Even after appellant told him to stop, Mr. Fair continued to put his hands on her. She also alleged that Mr. Fair began using foul language in her presence. Appellant stated that, when she used the number "69," Mr. Fair would make rude and vulgar comments. Mr. Fair always talked about his sexual experience when around her. Appellant stated that on several occasions Mr. Fair asked her to set him up with one of her girlfriends. Mr. Fair would also ask her to meet him for drinks. Appellant alleged that Mr. Fair continued to put his hands on her and inquire about her sex life. On June 9, 2003 Mr. Fair reportedly wanted to have another private talk with her. Appellant said she did not want to meet in private and preferred to have a witness present. However, Mr. Fair would not meet with her under those circumstances. Lastly, appellant stated that, during September 2003, Mr. Fair told her on several occasions she "needed a good f-----g."

In her EEO complaint, appellant alleged that Mr. Fair sexually harassed her and that she was relieved of her VMAS duties because of her gender or in retaliation for opposing Mr. Fair's sexual advances. In a decision dated June 21, 2005, the EEO Commission determined that there was no discrimination. The administrative judge found that there was "sufficient evidence to support a claim of harassment or hostile work environment on the basis of sex." He specifically found that appellant's allegations concerning Mr. Fair's behavior appeared "credible" and her testimony established that the harassment was based on sex. But while the EEO Commission found evidence of sexual harassment in the workplace, the employing establishment was relieved of any liability for Mr. Fair's misconduct because appellant neglected to take advantage of the specific procedures in place at her job for reporting sexual harassment. With respect to her claim that she was improperly relieved of her VMAS duties, the EEO Commission found that the employing establishment had a legitimate, nondiscriminatory basis for this personnel action.

By decision dated February 24, 2006, the Office hearing representative affirmed the October 21, 2005 decision denying the claim. The majority of appellant's allegations were found not to have been factually established, particularly those involving Mr. Fair's alleged sexual harassment.[3] Appellant also failed to establish a lack of training and that she was called names by coworkers. She did, however, establish that one of her duties was reassigned in October 2002 and that a coworker had been assigned to assist her with VMAS. The hearing representative also found that appellant was asked to provide documentation for FMLA authorization and that she was required to fill-up a truck with gas in the rain. Additionally, he found that she was required to clean, paint and take out the garbage. Of the factors the hearing representative found established, all were considered to be administrative in nature. Because there was no evidence of error or abuse on the part of the employing establishment, the hearing representative found that the established factors were noncompensable.

On August 16, 2006 appellant requested reconsideration. She submitted another copy of the June 21, 2005 EEO Commission decision and specifically referenced the administrative judge's finding regarding Mr. Fair's sexual harassment. Appellant also submitted a May 17, 2006 supplemental report from Dr. Hellard, who continued to find her disabled due to employment-related depression and anxiety. Dr. Hellard stated that appellant's symptoms began at her workplace as a direct result of harassment she alleged occurred there.

The Office received another statement from Mr. Fair dated September 26, 2006. He indicated that he never sexually harassed anyone. Mr. Fair also explained his "business decision" to change appellant's VMAS access status and to utilize her on other tasks. He denied that there was a hostile work environment at VMF.

In response to appellant's reconsideration request, the employing establishment argued that the June 21, 2005 EEO Commission finding of sexual harassment should not be accepted by the Office because the administrative judge did not base his finding on the facts, but on the observed demeanor of the witnesses. The employing establishment argued that the facts supported Mr. Fair's denial of any harassment. It noted that five coworkers said they had not seen any touching of a sexual nature between appellant and Mr. Fair nor did they hear him make comments of a sexual nature.

Appellant replied on October 24, 2006. She explained that Mr. Fair's "unwanted advances and verbal statements were not performed in front of any employee or coworker." Appellant also submitted a copy of an August 2, 2004 notice of proposed adverse action -- reduction in grade. The employing establishment had charged Mr. Fair with improper conduct and failure to perform his duties in a satisfactory manner. The improper conduct charge included five specific counts of misconduct directed toward appellant. These included unwelcome touching, graphic descriptions of sexual encounters and other intimate details, an invitation to partake in an illicit drug, Ecstasy, and other sexually-related statements. On at least one occasion, Mr. Fair reportedly told appellant that what she needs was a "'good f------g.'" On several other occasions he asked if she "had gotten some," a reference to having had sex.

[3] The hearing representative made no mention of the fact that appellant filed an EEO complaint and that a decision was issued June 21, 2005.

In a decision dated November 9, 2006, the Office reviewed the merits of the claim and denied modification. Appellant filed another request for reconsideration on January 24, 2007 and the result was the same. The Office denied modification in a decision dated April 18, 2007.

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.[4]

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.[5] 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.[6] 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.[7]

ANALYSIS

Appellant identified a number of employment incidents she claimed either caused or contributed to her diagnosed depression and anxiety. Of the employment incidents found to have occurred as alleged, the Office determined that these particular incidents involved administrative or personnel matters that were not compensable absent evidence of error or abuse on the part of

[4] *See Kathleen D. Walker*, 42 ECAB 603 (1991).

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

[6] *See Kathleen D. Walker*, *supra* note 4. 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).

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

the employing establishment.[8] With respect to the employment incidents involving time and attendance, availability and adequacy of job training, work assignments, reassignment of particular job duties and office space allocation, the Board finds these incidents noncompensable. Appellant has not presented any evidence of error or abuse on the part of the employing establishment with respect to its handling of the above-noted administrative and personnel matters.

As to the remaining allegations of verbal abused by Mr. Hall and sexual misconduct by Mr. Fair, the Board finds that the case is not in posture for decision. Verbal abuse or threats of physical violence in the workplace are compensable under certain circumstances.[9] This, however, does not imply that every ostensibly abusive or threatening statement uttered in the workplace will give rise to coverage under the Act.[10] Verbal altercations and difficult relationships with supervisors, when sufficiently detailed and supported by the record, may constitute compensable factors of employment.[11]

Regarding Mr. Hall, appellant alleged that he called her dumb and stupid on numerous occasions and told that her she could not learn anything. The offensive remarks initially occurred when Mr. Hall was assigned to assist appellant on VMAS. It allegedly continued whenever the two were subsequently assigned to work together. The employing establishment, however, has not provided any specific information in response to appellant's allegation that Mr. Hall was verbally abusive. The only statements in the record were provided by Mr. Fair and he did not offer any testimony about what Mr. Hall allegedly said to appellant. He merely commented that appellant had not complained to him about "anyone belittling or demeaning her." Mr. Fair July 13, 2005 statement is not particularly responsive and it predated appellant's more detailed account of what allegedly transpired in the workplace, which the Office received on October 26, 2005.

An employer who has reason to disagree with any aspect of the claimant's allegations shall submit a statement to the Office that specifically describes the factual allegation or argument with which it disagrees and "provide evidence or argument to support its position."[12] The employer may include supporting documents such as witness statements or any other relevant information.[13] If the employer does not submit a written explanation to support the disagreement, the Office may accept the claimant's report of injury as established.[14] The current

[8] As a general rule, an employee's reaction to administrative or personnel matters falls outside the scope of the Federal Employees' Compensation Act. 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. *Andrew J. Sheppard*, 53 ECAB 170, 173 (2001).

[9] *Fred Faber*, 52 ECAB 107, 109 (2000).

[10] *Id.*

[11] *Marguerite J. Toland*, 52 ECAB 294, 298 (2001).

[12] 20 C.F.R. § 10.117(a) (2007).

[13] *Id.*

[14] 20 C.F.R. § 10.117(b).

record does not include a statement from Mr. Hall addressing appellant's allegations that he was verbally abusive. In fact, there is no indication that the Office ever requested that the employing establishment respond to appellant's latest statement received October 26, 2005. The hearing representative was the first to address these specific allegations and the record indicates that he did not solicit the employing establishment's input regarding appellant's October 26, 2005 statement.[15] Thus, the Board finds that the case is not in posture for decision regarding the allegations of verbal abuse involving Mr. Hall.

The Office's development of the record regarding the numerous allegations of workplace sexual misconduct lodged against Mr. Fair is similarly deficient, and thus, precludes a complete and thorough review of this particular issue. Mr. Fair provided a blanket denial regarding the alleged sexual misconduct. However, an EEO Commission administrative judge, who presided over a hearing where both appellant and Mr. Fair testified, found appellant to be a more credible witness, and thus, accepted her testimony regarding numerous incidents of sexual harassment by Mr. Fair. The June 21, 2005 decision included specific findings of fact regarding Mr. Fair's inquiries about whether appellant was "get[ting] any?" and his repeated comments that she needed "a good fucking." The administrative judge also accepted appellant's testimony that Mr. Fair would discuss his personal sexual activities in great detail and that he asked her to go out with him and take the drug Ecstasy. EEO Commission findings may constitute substantial evidence relative to the claim to be considered by the Office and the Board.[16] Although the Office is not bound by the EEO Commission's finding that Mr. Fair sexually harassed appellant, there is legal precedent for accepting the demeanor-based credibility determinations of the trier of fact who had the opportunity to examine various witnesses.[17]

The administrative judge's acceptance of appellant's account of events lends some credence to her allegations that Mr. Fair made inappropriate advances and comments of a sexual nature. Furthermore, there is evidence in the record that the employing establishment, at least at one point, believed appellant's allegations of sexual misconduct to be credible. The record includes a copy of an August 2, 2004 proposed disciplinary action against Mr. Fair for sexual misconduct involving appellant. But there is no indication in the record that the Office ever asked the employing establishment to explain or provide any additional information regarding the proposed disciplinary action. Additionally, the employing establishment appears to have selectively disclosed only portions of appellant's EEO file in an effort to rebut her allegations, rather than providing the complete file for the Office to consider. Other potentially relevant evidence includes the "Agency's Report of Investigation," as referenced in the June 21, 2005 EEO Commission decision. However, this document was also not made available to the Office.

Proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[18]

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[15] *See supra* note 2.

[16] *Beverly R. Jones*, 55 ECAB 411, 417 n. 14 (2004).

[17] *J.S.*, 58 ECAB __ (Docket No. 06-2113, issued May 10, 2007); *Anthony J. DeWilliams*, 48 ECAB 410, 411 (1997).

[18] *William J. Cantrell*, 34 ECAB 1223 (1983).

The Board finds that further evidentiary development is necessary in the present case. Accordingly, the case is remanded to the Office for that purpose. After such development of the case record as the Office deems necessary, a *de novo* decision shall by issued.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 18, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: January 28, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board