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

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| **C.M., Appellant** | ) | |
| **and** | ) | **Docket No. 08-109** |
| | ) | **Issued: June 2, 2008** |
| **U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On October 15, 2007 appellant filed a timely appeal of a September 25, 2007 decision of the Office of Workers' Compensation Programs' hearing representative that affirmed the Office's December 18, 2006 decision that denied appellant's claim for an emotional condition and also denied her request for subpoenas. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

### ***ISSUES***

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied her request for subpoenas.

### ***FACTUAL HISTORY***

On August 21, 2006 appellant, then a 52-year-old clerk/expeditor, filed an occupational disease claim alleging that she sustained work stress, adjustment disorder and depression as a result of an off-the-job injury. She first became aware of the condition and its relation to her employment on August 2, 2006, the date that she stopped work. In an August 21, 2006 statement, appellant alleged that she was subjected to constant harassment and intimidation by

her managers due to an off-the-job injury. She alleged that she was threatened with disciplinary action due to her absences used in conjunction with the Family Medical Leave Act (FMLA). Appellant alleged that Theresa Ollis, a mail processing manager, tried to make her work outside her medical restrictions or be sent home. She indicated that her reasonable accommodation case was under appeal, and that she was told that she would not be permitted to work. Appellant also alleged that she was denied union representation. In an August 22, 2006 statement, Dean Petros, a case manager, controverted the claim. He stated that appellant was asked to comply with the requirements of the light-duty policy provided to employees who were requesting accommodation from a nonwork-related condition and any reaction to that policy was self-generated.

In an August 22, 2006 statement, Dale McKinney, the supervisor of customer service, gave background information noting that appellant had worked light duty since February 2, 2006 and that management continued the light duty until appellant's reasonable accommodation request was settled. After appellant's reasonable accommodation request was denied on July 14, 2006, he stated that appellant was advised that her previous light duty request had expired and that she would have to submit updated documentation by August 11, 2006. On August 11, 2006 Mr. McKinney stated that appellant requested temporary light duty but did not submit updated medical documentation that changed her doctor's previous finding of permanent restrictions. He noted that management would not approve temporary light duty since it contradicted her physician's statements. Mr. McKinney also noted that appellant was not denied union representation. In an accompanying August 11, 2006 statement, he indicated that he advised appellant that she did not need further medical documentation if she was requesting permanent light duty; however, if appellant sought temporary light duty, she would need updated documentation to report to work.

The employing establishment submitted an August 17, 2006 statement from Ms. Ollis who noted that appellant called that afternoon and requested union representation. Ms. Ollis informed appellant that her situation was a medical matter, not a disciplinary matter, which did not require union representation. She informed appellant that she could call Jennifer Cassell, a union representative, at home and have her come in on her own time. Ms. Ollis stated that she advised appellant that she needed to submit a request for permanent light duty; however, appellant became agitated, raised her voice, and asked how she would like it if she brought her attorney. She explained that she "didn't care what she did with her lawyer…." Ms. Ollis alleged that appellant called back at 3:30 p.m. and requested a written refusal regarding her request for union representation. However, she alleged that she repeated that the issue was a medical matter, which did not require union representation, but that, if appellant wanted it, she should contact Ms. Cassell. Ms. Ollis stated that appellant became "irate on the phone, raising her voice (yelling) and not making any sense." She indicated that she said "good-bye" and hung up. Further, Ms. Ollis noted that appellant called the postmaster and he gave the same advice to appellant. She advised that, when appellant arrived at work, she brought a witness and was provided paperwork to apply for permanent light duty. Ms. Ollis stated that appellant was advised that she could not work without being on permanent light duty. Additionally, she allowed appellant the opportunity to work light duty for that day only, as long as it was within her limitations. Ms. Ollis stated that appellant refused to fill out a permanent light-duty request and later informed her that her physician had placed her off work until September 5, 2006 under "stress leave."

The employing establishment also provided an August 17, 2006 statement from Johnny Broyles, a coworker, who alleged that on July 13, 2006 he asked appellant, "if you can't do the job, why don't you just retire." Mr. Broyles alleged that she replied, "s--t no, I'm going to milk it for all I can." He further alleged that he said, "you should just quit" and she alleged that "I'm not quitting."

Appellant submitted a March 22, 2006 statement from Darlene Howser, a union president, recounting a March 20, 2006 discussion between herself, Ms. Ollis and Jim Eskridge, the operations manager of the employing establishment. She alleged that Mr. Eskridge suggested that they would "[p]ut her to work at McDonalds and pay her the difference." Appellant alleged that he indicated that that was what they "did in Florida. Put her to work at McDonalds and pay her the difference." Ms. Howser stated that appellant and other female veterans were being "targeted." Additionally, the Office received July 10 and 14, 2006 memoranda regarding appellant's request for a reasonable accommodation; leave information for appellant from January 13 to September 13, 2005. The reasonable accommodation committee found that appellant was not disabled within the definition of the Rehabilitation Act of 1973 so that no reasonable accommodation was required. The Office also received a copy of an August 4, 2006 letter from Ms. Ollis to appellant, requesting that she submit her request for light duty by August 11, 2006.

Appellant also submitted evidence from healthcare providers. In a February 2, 2006 report, Dr. John D. Sherrill, a Board-certified family practitioner and treating physician, opined that appellant had permanent disability due to cervical spine degenerative disc disease with associated chronic pain syndrome secondary to a nonwork-related fall on January 13, 2005. He opined that appellant had permanent physical restrictions. In July 31 and August 2, 2006 treatment notes, Dr. Sherrill noted that appellant was agitated, had a loss of usual interests, and had increased tremulousness when approaching her worksite. On August 23, 2006 he opined that appellant had an adjustment disorder with depression secondary to job stress and could not perform her regular work duties. In an April 26, 2006 report, Jody D. Farra, a licensed psychologist, noted treating appellant for stress due to her fall on January 13, 2005, as well as job-related stress that resulted from pursuit of a reasonable accommodation request. In an August 30, 2006 report, she advised that appellant had a lifestyle altering neck injury but she had met with "nothing but frustration" in seeking reasonable accommodation. In a May 12, 2006 report, Dr. Wiley A. Greene, a chiropractor, noted treating appellant on December 21, 2005 for a fall that occurred in a restaurant on January 13, 2005.

After the Office requested additional evidence, on August 31, 2006, appellant described the circumstances that she felt contributed to her condition. She alleged that her stress arose due to the employing establishment's treatment of her and her off-the-job injury of January 13, 2005. Appellant alleged that, on September 13, 2005, she was ordered by Teresa Jones, a substitute supervisor for Ms. Ollis, to work outside of her medical restrictions. She also alleged that Dwight Smith, the postmaster, threatened disciplinary action for absences, when she went to his office to discuss the incident with Ms. Jones. Appellant stated that her supervisor, Mr. McKinney, sarcastically asked her when she was going to return to her job. She alleged that, when she went to his office to discuss his remarks, he indicated that he had defended her against Ms. Ollis, who wanted her out because of her light-duty status. Appellant also alleged that Mr. Eskridge indicated that he would get her a job at McDonalds, pay her the difference, and

then let her go after two years. She stated that she was ridiculed by several employees. Appellant reiterated the circumstances regarding the denial of her request to honor her light-duty restrictions. She asserted that her reasonable accommodation request was supposed to be heard within 20 days, but it was cancelled and rescheduled. Additionally, appellant stated that she was told that she had until August 11, 2006 to submit for light duty or she would not be permitted to work. She advised that she did not wish to be placed on permanent light duty. Appellant also alleged that, on August 9, 2006, there was an incident on the dock with a mail handler. She alleged that the mail handler lost his temper and, when she went to discuss the incident with Mr. McKinney, he told her to stay away. Appellant alleged that Mr. Broyles misconstrued something she might have said, and denied that she made the statement that he suggested. She stated that she was harassed regarding her requests for reasonable accommodation. Appellant asserted that, on September 5, 2006, she was placed off work for an additional two weeks, and was told to call the unscheduled leave line even though she felt her condition was job related. She denied yelling or raising her voice with Ms. Ollis.

On September 4, 2006 appellant's husband, contested the statement from Mr. Broyles and alleged that he could not read or write and had no idea what he had signed. In a September 5, 2006 statement, he stated that he was on the telephone when appellant spoke to Ms. Ollis. Appellant's husband alleged that Mr. Broyles' allegation that his wife became agitated and raised her voice was a "complete and total fabrication of the facts."

In a September 6, 2006 report, Dr. Sherrill noted that appellant noted that her nonwork-related cervical neck injury on January 13, 2005 resulted in restrictions of work limited to 40 hours weekly with no pushing or pulling over 100 pounds and no lifting over 15 pounds. He indicated that these restrictions were accommodated until the middle of July when the employing establishment insisted that appellant "sign a form to be placed on light duty only." Dr. Sherrill opined that this worsened appellant's chronic dysthymia with onset of major depression. He opined that appellant was totally disabled secondary to job stress and the associated major depression associated with the job stress.

The Office also received an October 5, 2005 letter addressed to appellant's senator, from Tammy J. Autenrieth, an employing establishment manager, who explained that appellant was provided with 12 weeks of FMLA leave related to her nonwork-related injury. Ms. Autenrieth indicated that, at the end of that time, appellant was unable to perform her regular job duties and was provided with a temporary light-duty assignment based upon her physician's recommendation, which was approved through January 2006. She noted that appellant's physician recently indicated that she has reached maximum medical improvement and should be placed on permanent light duty. Ms. Autenrieth indicated that appellant disagreed with her physician's opinion regarding whether her duty status was temporary or permanent. She also indicated that appellant had not been regular in her work attendance and was in danger of facing disciplinary action. Ms. Autenrieth indicated that appellant should request either temporary or permanent light-duty status.

The Office also received copies of February 13 and March 13, 2006 letters notifying appellant of her reasonable accommodation hearings and a copy of an August 30, 2006 grievance, which was denied, requesting that the employing establishment wait until the outcome of appellant's reasonable accommodation appeal before requesting that she apply for permanent

light duty. Appellant further submitted a copy of a grievance related to her reasonable accommodation request. The Office also received a January 12, 2005 e-mail from Kelley Moore, an employing establishment contractor, to Mr. Smith noting appellant's work restrictions and asking that she not work outside her restrictions.

By decision dated December 18, 2006, the Office denied the claim. The Office found that appellant had not established any incidents as having occurred in the performance of duty.

On December 26, 2006 appellant requested a hearing that was held on July 11, 2007. On February 4, 2007 she requested that the Office subpoena five witnesses; Mr. McKinney; Mr. Broyles; Darlene Carter, a clerk alleged to have solicited an untrue statement; Mr. Petros; and Ms. Howser. Appellant listed what she believed their testimony would support.

In an August 9, 2006 statement, appellant described an incident that occurred with Wes Cooper, a mail handler. She alleged that he raised his voice towards her and she told him that she was "not taking anything off of him." Appellant alleged that she went to Mr. McKinney and he told her not to go near Mr. Cooper, as he had a "history of losing his temper and a bad attitude." The Office also received a statement from Ms. Howser regarding a September 20, 2006 meeting with Mr. Smith. She indicated that Mr. Smith acknowledged that they "probably did not follow the proper procedure" in appellant's reasonable accommodation issue. Ms. Howser advised that he agreed to hold the grievance in abeyance until the case had been heard and decided. The Office also received treatment notes from July 6, 2006 to April 25, 2007.

By decision dated September 25, 2007, the Office hearing representative affirmed the Office's December 18, 2006 decision. Additionally, the Office denied appellant's request for the issuance of a subpoena.

## ***LEGAL PRECEDENT -- ISSUE 1***

Workers' compensation law does not apply to each and every illness that is somehow related to an employee's employment. There are situations where an injury or 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 specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[1] 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.[2]

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

[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 126 (1976).

adversely affected by employment factors.[3] 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.[4]

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 the physician when providing an opinion on causal relationship and, which working conditions are not deemed factors of employment and may not be considered.[5] 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 the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[6]

## ***ANALYSIS -- ISSUE 1***

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must, thus, initially review whether the alleged incidents and conditions of employment are compensable under the terms of the Act.

The Board notes that appellant made several allegations related to administrative or personnel matters. These allegations are unrelated to the employee's regular or specially assigned work duties, and do not generally fall within the coverage of the Act.[7] 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. In determining whether the employing establishment erred or acted abusively, the Board has examined whether management acted reasonably.[8]

Among the administrative matters alleged by appellant, she alleged that the employing establishment did not provide her with a reasonable accommodation in relation to her nonwork-related injury. Additionally, she alleged that the employing establishment requested that she fill out a permanent light duty form and refused to offer her a light-duty position. The Board has held, however, that assignment of work duties is an administrative function of the employer and that denials by an employing establishment of a request for a different job, promotion or transfer

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

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

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

[6] *Id.*

[7] An employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. *Sandra Davis*, 50 ECAB 450 (1999).

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

are not compensable factors of employment under the Act, as they do not involve an employee's ability to perform her regular or specially-assigned duties but rather constitute a desire to work in a different position.[9] Appellant has not presented any such evidence to show erroneous or abusive actions by management and the employing establishment denied any error or abuse in this matter. The employing establishment explained its actions and the evidence does not show that it acted unreasonably in the matter. In particular, Mr. McKinney indicated that appellant did not need further medical documentation if she was requesting permanent light duty as permanent restrictions were stated in her last medical documentation. However, if appellant sought temporary light duty, she would need updated documentation to report to work since her previous medical documentation supported permanent restrictions. Mr. McKinney also indicated that, although appellant's prior approved light duty had expired, the employing establishment extended her light duty until a decision was reached on her reasonable accommodation request. Furthermore, Mr. Petros advised that appellant was asked to comply with the requirements of the light-duty policy provided to employees who were requesting accommodation from a nonwork-related condition. Furthermore, regarding appellant's reactions concerning the type of light-duty assignment that she desired, the Board, as noted, has found that frustration from not being permitted to work in a particular environment or to hold a particular position is not compensable. Thus, appellant has not established a compensable employment factor under the Act in this respect.

To the extent that appellant was alleging that she disagreed with the way the employing establishment handled her requests for reasonable accommodation, the Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.[10]

Appellant's allegations regarding the employing establishment's leave policies,[11] relate to administrative and personnel matters, which are noncompensable unless the employee shows that the employing establishment erred or acted unreasonably.[12] She has not submitted evidence establishing that the employing establishment acted unreasonably with regard to any leave matters. Appellant also alleged that she was threatened with disciplinary action regarding her requests for FMLA. However, this allegation is not supported by the record as her allegations are not specific as to time or place. Furthermore, the record indicates that appellant was provided with 12 weeks of FMLA leave related to her nonwork-related injury. The Board finds that she has not established a compensable factor in this regard.

Regarding appellant's allegations that she was improperly denied union representation, the Board notes that the employing establishment denied this allegation. On August 24, 2006 the Office received a statement from Ms. Ollis, who noted that appellant called her and requested

[9] *See Charles D. Edwards*, 55 ECAB 258 (2004).

[10] *See Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

[11] *Barbara J. Nicholson*, 45 ECAB 803 (1994); *Diane C. Bernard*, 45 ECAB 223 (1993).

[12] *Andrew J. Sheppard*, 53 ECAB 170, 173 (2001).

union representation. She advised that she explained to appellant that union representation was not required regarding medical matters, but that, if she wished to have a union representative present, she should contact Ms. Cassell. Mr. McKinney also confirmed that appellant was not denied union representation. The Board finds that appellant's allegations are without merit and appellant has not established a compensable employment factor.

Appellant also alleged that a coworker raised his voice at her on August 9, 2006. She further alleged that her supervisor told her to avoid the individual. The Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[13] Appellant has not shown how such an isolated instance of a raised voice would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.[14]

Appellant also alleged that the employing establishment's actions constituted harassment which contributed to her claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[15] However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[16] In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and she has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors or coworkers.[17] Appellant alleged that supervisors and coworkers made statements and engaged in actions which she believed constituted harassment and discrimination, but she provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.[18] Ms. Howser alleged that management spoke disparagingly of appellant out of her presence. However, there is no other supporting evidence that any such statements occurred or that any such statements would rise to the level of a compensable employment factor. As noted, the employing establishment explained the reasons for its actions and denied acting improperly. The evidence does not substantiate appellant's allegations of disparate treatment.

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[13] *See Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

[14] *See, e.g., Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers' comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). *Compare Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

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

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

[17] *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).

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

While appellant referred to grievances, the Board notes that there are no findings in her favor. The Board has held that grievances, by themselves, do not establish that workplace harassment or unfair treatment occurred.[19] In this case, the record does not contain a final decision in appellant's favor regarding a grievance. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant also alleged that she was asked to work outside her medical restrictions. However, she did not specify which tasks she was assigned that were not in accordance with her work restrictions. Mr. McKinney indicated that appellant was only allowed to work within her medical her restrictions until her reasonable accommodation request was denied. Ms. Ollis also supported that the employing establishment would not allow appellant to work any duties outside of her restrictions. Appellant has not established that she performed any tasks outside of her medical limitations.

Appellant has not otherwise established that performance of her regular or specially assigned duties caused or aggravated her claimed emotional condition. For these reasons, she has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[20]

## ***LEGAL PRECEDENT -- ISSUE 2***

Section 8126[21] of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. Office regulations state that subpoenas for documents will be issued only where the documents are relevant and cannot be obtained by any other means. Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.[22]

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issue in the case and show that a subpoena "is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained."[23] The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable

[19] *See Michael L. Deas*, 53 ECAB 208 (2001).

[20] 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).

[21] 5 U.S.C. § 8126.

[22] 20 C.F.R. § 10.619.

[23] *Id.*

exercise of judgment or actions taken that are clearly contrary to logic and probable deductions from established facts.[24]

## ***ANALYSIS -- ISSUE 2***

Appellant submitted a request for subpoenas on February 4, 2007. She cited several witnesses for whom she requested the issuance of subpoenas. However, appellant did not show why information from these individuals could not be obtained other than through the subpoena process. The Board finds that the hearing representative acted within her discretion in denying appellant's request for subpoenas.

## ***CONCLUSION***

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty. The Board also finds that the hearing representative acted within her discretion in denying appellant's request for subpoenas.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 25, 2007 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: June 2, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[24] *Dorothy Bernard*, 37 ECAB 124 (1985).