

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

C.W., Appellant)

and)

U.S. POSTAL SERVICE, LIVINGSTON POST)
OFFICE, Columbus, OH Employer)

Docket No. 09-354

Issued: September 3, 2009

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge

COLLEEN DUFFY KIKO, Judge

MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 17, 2008 appellant, through counsel, filed a timely appeal from the April 9, and October 2, 2008 decisions of the Office of Workers' Compensation Programs denying her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

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

FACTUAL HISTORY

On July 27, 2007 appellant, then a 41-year-old sales and service associate, filed an occupational disease claim alleging panic attacks and anxiety, which she attributed to her federal

employment. On August 17, 2007 the employing establishment controverted her claim. It noted that appellant last worked on December 8, 2006.¹

On September 18, 2007 the Office requested that appellant submit further information regarding those factors of her employment to which she attributed her condition. Appellant responded alleging harassment and discrimination on the part of her supervisor, Marianne Stewart. She noted that she began work at the Livingston City station in early 2006 and that her duties included manually sorting and preparing the mail for the letter carriers and recording and distributing registered mail. During the last week of June 2006, Ms. Stewart began work at the station. In an individual meeting on July 10 or 20, 2006, she discussed appellant's uniform, noting that she was a "stickler" about uniforms. Appellant was advised that her shoes had to be black and to wear either blue or grey pants. The supervisor also told appellant that her shirt had to be tucked in, which appellant stated would be uncomfortable as she wore a plus size. Appellant described Ms. Stewart as a small built woman who, while having this conversation, lifted what she could of her own midsection, stating: "Well, I have this too and I tucked my shirt in." She stated that she was never previously requested to tuck in her shirt and was offended by her supervisor's gesture. Appellant went back to work but experienced a panic attack while helping a customer.

During August 2006, appellant alleged that she had several confrontations with Ms. Stewart over her work responsibilities. On August 7, 2006 she worked a split shift; however, her supervisor told her to leave the accountable cart unattended and perform other duties. Appellant stated that Ms. Stewart pulled her away from the accountable mail and she returned to find items missing that were not signed out. She contended that her supervisor was "playing games" with her job and attempted to bait her into arguments. At lunch that day, appellant went to see her physician, who advised that she was having a panic attack. She returned to work to close out her cash drawer and alleged that Ms. Stewart started yelling at her from across the workroom.

On October 10, 2006 appellant's supervisor rummaged through the mail tubs while appellant was attempting to retrieve mail. Appellant backed away from the mail tub and, when asked if there was a problem, responded that she was getting out of the way. She alleged that Ms. Stewart made a comment about her attitude. On October 14, 2006 appellant alleged that Ms. Stewart repeatedly told her to keep working the mail while at the tub. She waited until her supervisor was through, contending that it was unsafe to retrieve mail and she did not want Ms. Stewart to touch her. Later that day, Ms. Stewart advised appellant that a window clerk would let her know when she could take her breaks and lunch. Appellant contended that the clerk was not her supervisor or otherwise qualified. On October 20, 2006 she had a panic attack following a confrontation with Ms. Stewart concerning some religious clothing left in the women's restroom. Appellant noted that the clothes did not belong to her. On the morning of October 21, 2006, she answered the telephone and was advised by Dominic Allen, a coworker, that he was calling in sick and would call back to speak to a supervisor. Appellant left a message; however, Ms. Stewart told her that she was not to get personal information from

¹ The employing establishment noted that appellant's sister also last worked on December 8, 2006, when she was placed off work pending her removal due to a disciplinary action.

employees but to just tell them to call back when a supervisor was present. The supervisor noted that medical and personal information were none of appellant's business. Appellant also described panic attacks occurring in November and December 2006 while driving to work, bowling and attending a private banquet, which her supervisor also attended. On December 7, 2006 she was having a conversation with another clerk when Ms. Stewart allegedly made a snide remark. On December 8, 2006 Ms. Stewart accused appellant of throwing a \$5.00 or \$10.00 bill at her during an audit. When appellant requested that a witness be present to complete the audit, Ms. Stewart told her to leave the building. Appellant stopped work that day and did not return.²

Appellant submitted statements from various coworkers who noted that they witnessed several panic attacks. She also made general allegations that her supervisor created a hostile work environment through constant criticism, humiliating behavior, sabotaging her work performance and making untrue reports to management. In a December 18, 2006 letter to an Employee Assistance Program counselor, appellant reiterated that her supervisor created a hostile work environment.³

In a statement dated January 29, 2008, Patrick A. LaRosa, manager of customer service, indicated that appellant, her sister and former manager at the station were very good friends, such that the sisters were given special treatment. He noted that Ms. Stewart addressed proper attire with appellant as required, even though she had not been made to wear one before. Although appellant described Ms. Stewart's gesture of tucking in her own shirt as inappropriate, Mr. LaRosa noted that she did not state how far the supervisor had raised her shirt. Mr. LaRosa noted that work assignments were changed to split work loads equally between all the mail clerks and that Ms. Stewart had delegated tasks in a fair manner. He contended that appellant was challenged by Ms. Stewart to do her job correctly following a past inappropriate relationship with the prior manager.⁴

In a May 18, 2007 memorandum, the employing establishment proposed placing appellant on a 14-day suspension for improper conduct. It was noted that appellant had acknowledged using her sister's computer password to log onto the point of sale machine and onto the main computer, approximately four to five separate times on each machine. Appellant was aware that her actions violated employing establishment policy. In a step 2 decision dated August 6, 2007, the employing establishment denied appellant's grievance with regard to this matter.⁵

² Appellant subsequently met with postal officials for predisciplinary interviews in April and May 2007. This concerned a 14-day suspension issued for having used her sister's password to access computers at the employing establishment.

³ Appellant submitted medical evidence in support of her claim.

⁴ On April 1, 2008 Sue Rene Con, a supervisor, noted that postal policy required that registered mail be kept secure or locked at all time. If a clerk working at the accountable cart was asked to perform other duties, the clerk would either inform a supervisor to lock the mail in a safe or keep such items in their possession. There was no record of appellant being disciplined for violating these procedures. The employing establishment could not confirm appellant's allegation that items were missing on August 7, 2006.

⁵ On October 31, 2007 a notice of 14-day suspension was issued for unsatisfactory attendance since June 1, 2007.

In an April 9, 2008 decision, the Office denied appellant's claim. It found that she did not submit sufficient evidence to establish error or abuse on the part of Ms. Stewart in the alleged administrative actions.

By letter dated April 25, 2008, appellant, through her attorney, requested a telephonic hearing.⁶ On June 4, 2008 appellant's sister stated that she observed her sister have a panic attack the second week of July 10, 2006. She noted that, when Ms. Stewart came to the employing establishment, she caused a hostile work environment.

At the August 12, 2008 hearing, appellant testified that Ms. Stewart had numerous issues with her sister and had difficulty separating them. She discussed the uniform incident, noting that she had always worn men's shirts, bought her own pants and wore her shirt outside of her pants because she was a large woman. Appellant noted that Ms. Stewart made a gesture "jiggling" her stomach that she found to be very rude. Moreover, the supervisor failed to properly explain why appellant needed to tuck in her shirt. Appellant reiterated her allegations concerning Mr. Allen's telephone call and noted that most clerks just yelled information to a supervisor. She wrote out a message because she did not want to forget that he called. Ms. Stewart told her that the message was inappropriate. Counsel contended that appellant was singled out for harsher, inappropriate discipline.

By decision dated October 2, 2008, an Office hearing representative affirmed the denial of appellant's claim.

LEGAL PRECEDENT

To establish that she sustained an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that she has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her stress-related condition.⁷ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor.⁸ 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.⁹

Workers' compensation law is not applicable 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

⁶ Appellant submitted a statement from Mr. Allen concerning the telephone message he left when sick. Mr. Allen noted that appellant took the call but, since no supervisor was yet at work, he called back twice. He stated that he overheard other clerks telling a supervisor when an employee was sick, but only appellant was reprimanded.

⁷ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁸ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁹ *Id.*

concept or coverage of workers' compensation. When the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.¹⁰ On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.¹¹

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.¹² 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.¹³ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.¹⁴

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.¹⁵ A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.¹⁶ The issue is whether the claimant has submitted sufficient evidence to establish a factual basis for the claim by supporting any allegations with probative and reliable evidence.¹⁷ The primary reason for requiring factual evidence from the employee 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.¹⁸

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

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

¹¹ *Gregorio E. Conde*, 52 ECA 410 (2001).

¹² See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

¹³ See *William H. Fortner*, 49 ECAB 324 (1998).

¹⁴ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁵ See *Michael Ewanichak*, 48 ECAB 364 (1997).

¹⁶ See *Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

¹⁷ See *James E. Norris*, 52 ECAB 93 (2000).

¹⁸ *Beverly R. Jones*, 55 ECAB 411 (2004).

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.¹⁹ If a claimant does implicate a factor of employment, it 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.²⁰

ANALYSIS

Appellant alleged that she sustained an emotional condition due to harassment and discrimination on the part of her supervisor. The Office denied her emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must review whether the alleged incidents are established as compensable factors under the Act.

The Board notes that appellant did not make any allegations concerning her regular or specially assigned job duties under *Cutler*. Rather, appellant made allegations concerning discrimination or abuse on the part of Ms. Stewart, her supervisor, in several administrative and personnel matters. She noted having a meeting with her supervisor in July 2006 concerning her uniform. Appellant alleged that, during the meeting, Ms. Stewart advised her to tuck in her shirt and made a gesture in the area of her midsection stating “Well, I have this too and tucked my shirt in.” She noted that she had never been instructed to wear her shirt tucked in and that she was offended by her supervisor’s gesture. The Board finds that appellant has not established a compensable factor regarding this allegation. The nature of the gesture attributed to her supervisor is, at best, vague. The nature of the meeting as described by appellant does not evidence harassment or discrimination on the part of her supervisor and there is no showing that any gesture on her part constituted abuse. Appellant noted only that she had not previously been instructed to wear her shirt tucked into her pants. However, this fact does not establish error on the part of her supervisor by instructing appellant to do so in the future. While the gesture attributed to Ms. Stewart may have engendered offensive feelings, the evidence of record does not establish error or abuse.²¹

Appellant alleged that on August 7, 2006 her supervisor asked her to perform duties away from the accountable mail cart. She alleged that upon her return items were missing that were not signed out. Appellant alleged that her supervisor was “playing games.” However, the evidence of record does not establish this allegation as factual. The employing establishment noted that appellant had no record of having items lost from the cart. Moreover, there was no description of the items that were allegedly removed or taken. Similarly, appellant alleged two occasions on which Ms. Stewart “rummaged” through the mail tubs while she was working. When asked if there were any problem, appellant notes that she would wait until her supervisor

¹⁹ *Dennis J. Balogh, supra* note 8.

²⁰ *Id.*

²¹ *See Cyndia R. Harrill, 55 ECAB 522 (2004).*

was finished. There is no showing how this activity was abusive or in error. Appellant alleged that Ms. Stewart made a comment about her attitude, but did not provide any description of any comment allegedly made. She alleged a panic attack on October 20, 2006 after her supervisor inquired as to whether clothing items found in the women's restroom belonged to her. Appellant noted that she took a telephone message from Mr. Allen on October 21, 2006 when he called in sick. Thereafter, Ms. Stewart told appellant that she was not to take personal information from coworkers but to tell them to call back when a supervisor was present. She alleged that, on December 7, 2006, her supervisor made a snide remark while she was talking with another employee. On December 8, 2006 Ms. Stewart allegedly accused appellant of tossing money at her during an audit. The Board has recognized the compensability of verbal altercations or physical abuse when sufficiently detailed by the claimant and support by the record. However, this does not imply that every statement uttered in the workplace will give rise to compensability under the Act.²² The evidence submitted by appellant does not contain a description of any comments made by her supervisor. The statements of her sister and Mr. Allen failed to provide an account of any conversation they may have heard between appellant and Ms. Stewart. For this reason, appellant has not established verbal or physical abuse as a compensable factor.

The handling of disciplinary actions and leave requests, the assignment of duties and the monitoring of work activities are generally related to employment; however, they are administrative functions of the employer and not duties of the employee.²³ Appellant also alleged that her supervisor told her that another window clerk would be the T6 on a certain Saturday and that she would assign breaks. She objected to this as she contended that the clerk was not a T6 and was not trained to perform these duties. This is an administrative action and not compensable absent a showing of error or abuse, which appellant has not shown.

The Board notes that appellant was disciplined for using her sister's password on several work computers. The Board notes that disciplinary actions are administrative functions of the employer and not duties of the employee and, unless the evidence discloses error or abuse on the part of the employing establishment, are not compensable employment factors.²⁴ An internal investigation showed that appellant used her sister's password on several occasions and that she knew that this was against the policy of the employing establishment. Accordingly, no error was shown.

Appellant made general allegations that her supervisor created a hostile work environment, sabotaged her work performance and made untrue reports to management. For harassment and discrimination to give rise to compensable disability, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable.²⁵ There is no proof that appellant was reprimanded for leaving clothing in the restroom or that her supervisor made an obscene gesture. There is no evidence to support her allegations that her supervisor could not keep her and her sister separate.

²² See *David C. Lindsey*, 55 ECAB 263 (2005).

²³ See *Lori A. Facey*, 55 ECAB 217 (2004). See also *Janet I. Jones*, 47 ECAB 345 (1996).

²⁴ *Marvin S. Freeland*, 57 ECAB 607 (2006).

²⁵ *Doretha M. Belnavis*, 57 ECAB 311 (2006).

Appellant alleged that her supervisor was an unwelcome guest at a private banquet for a family member. In addition to the fact that there is no corroborating evidence supporting this allegation, there is no evidence as to how this related to her federal employment.

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.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 2 and April 9, 2008 are affirmed.

Issued: September 3, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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