United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant **and** **U.S. POSTAL SERVICE, VEHICLE MAINTENANCE FACILITY, Huntsville, AL, Employer**	)	**Docket No. 09-1654** **Issued: July 14, 2010**

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 June 22, 2009 appellant timely appealed the May 8, 2009 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration. The latest merit decision was issued on April 21, 2008, more than one year prior to the appeal. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the Office's May 8, 2009 nonmerit decision.[1]

ISSUE

The issue is whether the Office properly denied appellant's March 26, 2009 request for reconsideration under 5 U.S.C. § 8128(a).

[1] For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

This case was previously before the Board.[2] Appellant, a 56-year-old clerk, filed an occupational disease claim for stress, depression and anxiety that reportedly arose on or about September 15, 2003. She claimed, *inter alia*, that she had been sexually harassed by her supervisor, Kenneth W. Fair. The harassment allegedly began in January 2002, soon after appellant's arrival at the vehicle maintenance facility (VMF). Appellant also alleged that Mr. Fair and another coworker, Ronnie Hall, had been verbally abusive. Both men allegedly called her "dumb" and "stupid" and told her she was not smart enough to learn anything.[3]

Appellant filed an Equal Employment Opportunity (EEO) complaint against Mr. Fair for sexual harassment,[4] which the EEO Commission denied by decision dated June 21, 2005. While there was "sufficient evidence to support a claim of harassment or hostile work environment on the basis of sex," the EEO Commission found that appellant had not proven she was the victim of unlawful discrimination.[5] Despite evidence of sexual harassment in the workplace, the employing establishment was relieved of any liability for Mr. Fair's misconduct because appellant unreasonably failed to take advantage of specific workplace procedures for reporting sexual harassment.[6]

When the case was previously on appeal, the Office had already issued four separate merit decisions all finding that appellant had not established a compensable employment factor. The last merit decision was issued on April 18, 2007. By decision dated January 28, 2008, the Board set aside the Office's April 18, 2007 decision and remanded the case for further development. The Board found that, because of inadequate development of the record, appellant's allegations of verbal abuse and sexual misconduct were not in posture for decision.[7] The Board further noted that EEO Commission findings may constitute substantial evidence relative to a claim under the Federal Employees' Compensation Act.[8] While the Office was not bound by the EEO Commission's finding that Mr. Fair sexually harassed appellant, the Board

[2] Docket No. 07-1556 (issued January 28, 2008).

[3] Appellant also took exception to various other employment incidents regarding time and attendance, availability and adequacy of job training, work assignments, reassignment of particular job duties and office space allocation.

[4] She also alleged that Mr. Fair had improperly removed her from her vehicle maintenance accounting system (VMAS) duties because of her gender and/or because she declined his sexual advances.

[5] The EEO Commission stated that, "[b]ased on the observed demeanor of all witnesses, especially … [appellant] and Mr. Fair, [appellant's] allegations concerning the behavior of Mr. Fair appear credible." The EEO Commission further found that appellant's testimony established that "the harassment was based on sex."

[6] Regarding 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.

[7] With respect to 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 found those administrative and personnel matters noncompensable. The Board's January 28, 2008 decision (Docket No. 07-1556) is incorporated herein by reference.

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

explained that there was legal precedent for accepting demeanor-based credibility determinations.[9]

On remand, the Office obtained additional evidence, including recent statements from Mr. Fair and Mr. Hall, both of whom denied appellant's accusations.

In a decision dated April 21, 2008, the Office again found that appellant failed to establish a compensable employment factor. As to the allegations of verbal abuse and sexual harassment, the Office found that the alleged incidents involving Mr. Hall and Mr. Friar had not been factually established. The Office noted that appellant's behavior during the time of the alleged sexual misconduct cast doubt on her credibility. In particular, it stated that she had not advised "anyone inside or out of the agency of any sexual misconduct by Mr. Fair until after [she had been] removed from [her] VMAS duties."[10] Because of recent statements from Mr. Hall and Mr. Fair denying appellant's accusations and her so-called "contradicting behavior" during her employment at the VMF, the Office found that the alleged verbal abuse and sexual harassment was not factually established.

Appellant requested reconsideration on March 26, 2009. Her request was accompanied by an undated declaration from Virginia White, several training certificates, and a November 18, 2003 psychiatric report that she had previously submitted.

In her sworn statement, Ms. White indicated that she knew appellant for approximately 25 years. She also stated that she had been spending a lot of time with appellant before and at the time she started to work at Huntsville VMF. Ms. White indicated that appellant "had n[o]t been working there [one] month when she would come home crying." Appellant reportedly told Ms. White that her boss was calling her "dumb & stupid." Ms. White further stated that not too long after that appellant told her that her boss was trying to get her to talk about her sex life. According to her, appellant told her the boss would come by and pinch her on the butt or talk ugly to her. Ms. White also stated that appellant's boss tried to get her to go with him for drinks and he asked her to do drugs. Appellant's boss also "would say ugly things to her and even ask her if she wanted to f--k." Ms. White further stated that in 2002 appellant told her that her boss tried to touch her "private parts" when they would be in the same vehicle working. Appellant also reportedly told Ms. White that her boss had tried to get her to pull off the road for sex. Ms. White said that appellant told her on several occasions that she told her boss that "no way was she going to have sex with him." Appellant also reportedly told him that she did not appreciate him treating her that way. When Ms. White talked to appellant in September 2003 about her being off work, appellant reportedly told her that she could not take her boss doing that to her anymore. Appellant also reportedly told Ms. White that she had been to her doctor and he was concerned so he sent her to a psychiatrist, who then took her off work.

By decision dated May 8, 2009, the Office denied appellant's request for reconsideration. It did not review the merits of the claim because the evidence submitted "was irrelevant or immaterial…." The Office explained that Ms. White's statement was "considered here say (sic)

[9] *J.S.,* 58 ECAB 515, 520 (2007); *Anthony J. DeWilliams*, 48 ECAB 410, 411 (1997).

[10] The Office further noted that appellant had given Mr. Fair a coffee mug and toys for his dog.

since she was not there at the time of the occurrence and only [was] saying what [appellant] relayed to her."

LEGAL PRECEDENT

The Office has the discretion to reopen a case for review on the merits.[11] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[12] When an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[13]

ANALYSIS

In denying appellant's request for reconsideration, the Office indicated that the evidence submitted was either "irrelevant or immaterial." As previously noted, one avenue of obtaining merit review is to submit relevant and pertinent new evidence not previously considered by the Office.[14] The Board agrees that the psychiatric report and the training certificates are not particularly relevant to the issue of whether appellant established a compensable employment factor. However, the Office erred with respect to its treatment of Ms. White's statement. There is no indication that this evidence was previously submitted, and the substance of Ms. White's statement is clearly relevant to the question of whether appellant was sexually harassed and/or verbally abused in the workplace. It is also relevant to what the Office characterized as appellant's "contradicting behavior." In its April 21, 2008 decision, the Office questioned appellant's veracity because she had not advised "anyone inside or out of the agency of any sexual misconduct by Mr. Fair until after [she had been] removed from [her] VMAS duties." However, according to Ms. White, appellant confided with her about problems at work on several occasions prior to September 2003 when the employing establishment limited appellant's access to VMAS and she stopped working. While appellant may not have informed anyone inside the agency of Mr. Fair's alleged misconduct, Ms. White's statement demonstrates that there was at least one individual outside the agency that appellant contemporaneously advised of the claimed harassment and abuse.

The Office dismissed Ms. White's statement as hearsay, noting that she was not present when the events occurred and she only repeated what appellant told her. Ms. White's lack of firsthand knowledge of the alleged harassment goes to the weight or probative value of the evidence, not whether the statement is sufficient to warrant reopening appellant's claim for

[11] 5 U.S.C. § 8128(a) (2006).

[12] 20 C.F.R. § 10.606(b)(2) (2009).

[13] *Id*. at § 10.608(b).

[14] *Id*. at § 10.606(b)(2)(iii).

further merit review. Moreover, the hearsay nature of the statement does not negate the fact that appellant told Ms. White of her troubles at work contemporaneous with the occurrence of the alleged events. Because Ms. White's statement is relevant and pertinent new evidence, appellant is entitled to a review of the merits of her claim. Accordingly, the May 8, 2009 decision shall be set aside and the case remanded for further merit review in accordance with 20 C.F.R. §§ 10.608(a) and 10.609.

CONCLUSION

The Board finds that the Office improperly denied appellant's March 26, 2009 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the May 8, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: July 14, 2010
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