

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

T.C., Appellant

and

**U.S. POSTAL SERVICE, NEWPORT BEACH
POST OFFICE, Newport Beach, CA, Employer**

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**Docket No. 09-1097
Issued: March 8, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 17, 2009 appellant, through counsel, filed a timely appeal of the April 24, 2008 and January 6, 2009 merit decisions of the Office of Workers' Compensation Programs, finding that she did not sustain an emotional condition in the performance of duty. 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 sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On March 26, 2007 appellant, then a 54-year-old letter carrier, filed an occupational disease claim alleging that on August 14, 1994 she first realized that her stress, depression and anxiety were caused by harassment and humiliation by the employing establishment. She was unable to cope with working in a hostile environment. Appellant stopped work on

November 1, 2005.¹ Medical reports dated October 4, 2005 to February 14, 2007 of Dr. Samuel H. Albert, an attending Board-certified psychiatrist, advised that appellant suffered from a single episode of major depressive disorder and generalized anxiety disorder. He found that she was totally disabled for work.

In an April 2, 2007 letter, Assistant Postmaster Jose A. Holper, controverted the claim. He stated that no employee had complained about working in a hostile environment at the employing establishment.

By letter dated August 20, 2007, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It requested additional factual and medical evidence in support of her claim.

In a September 10, 2007 report, Dr. Albert reiterated his diagnoses of depressive disorder and generalized anxiety disorder.

By decision dated September 25, 2007, the Office denied appellant's claim, finding that she did not sustain an emotional condition in the performance of duty. She failed to submit sufficient evidence to establish that she was harassed, humiliated or worked in a hostile environment, as alleged.

In a September 13, 2007 narrative statement, appellant alleged that from November 1994 until July 2000, Postmaster Dennis McKeown and Assistant Postmaster Holper referred to her as the most beautiful girl in the world's sister. She was teased and harassed by employees who believed she was inept at performing her job because it was difficult for her to learn or be responsible for five different routes. Appellant complained to the union and her supervisors, but no action was taken. At the end of 1997 or beginning of 1998, Steve Rocco, an employee, directed loud grunting noises and animal sounds towards appellant which created an uncomfortable work environment for her. She complained to Bob Helfman, a supervisor, who denied hearing the noises. Appellant contended that he criticized her work and threatened to fire her without allowing her union representation. In August 1994, Don Jones, an employee, told appellant that she was beautiful. Robert Moss, an employee, asked her to bring him a picture of herself when she was young because he bet that she was hot then since she was really hot at that time. Appellant contended that he brushed up against her and stuck out his tongue pretending to lick his lips. She asked him to stop sexually harassing her and Eileen Denamie, a supervisor, made them make up by hugging one another.

Appellant alleged that when she advised Jeff Ayalla, a supervisor, that her attending physician recommended that she remain off work for one week due to a back injury she sustained at work on April 7, 2000, he responded by using profane language. Mr. Ayalla stated that he would talk to her any way he wished. Appellant stated that Jerry Ramirez and Mr. Nguyen, supervisors, and Jeanie, an employee, witnessed this incident. Assistant Postmaster Holper subsequently found out about the incident. Following appellant's return to work in June 2000 Mr. Rocco continued to make loud noises. She complained to Mr. Helfman who

¹ In April 2007 the Office of Personnel Management approved appellant's application for disability retirement.

stated that Mr. Rocco could do what he wanted to because unlike her, he could finish his route in eight hours.

Appellant contended that in the Fall of 2004, Todd Steaffens, an employee, walked around the work area moving his hips like a woman and mimicking her voice. She further contended that employees shot rubber bands and threw balls across the room. In the Summer of 2000, Assistant Postmaster Holper introduced appellant to a union representative as the most beautiful girl in the world's sister. The union representative responded that the comment constituted sexual harassment. Assistant Postmaster Holper replied that his comment was appropriate since he knew appellant's sister. Stephan D. Evans, an employee, put his arm around appellant and told her she was beautiful. She reported this incident to Assistant Postmaster Holper who laughed. On October 1, 2005 appellant's coworkers repeatedly made shushing sounds to deliberately harass and upset her when she walked passed them. Appellant became upset and as she left the work area to go home, they applauded loudly. She stated that Mr. Helfman took no action against them. Appellant stated that Dana S. Herzog, an employee, complained to management about loud noises made by employees. Appellant filed a complaint with the Equal Employment Opportunity (EEO) Commission on October 11, 2005 alleging sexual harassment and stressful working conditions at the employing establishment which was denied. She also filed a complaint with the employing establishment's labor relations office regarding these matters, but stated that she never received a response.

In a September 17, 2007 narrative statement, Mr. Herzog related that he witnessed employees harass appellant by shouting comments about her across the workroom floor. They also mocked how she walked and talked, and directed noises at her when she walked through the work area. Mr. Herzog stated that appellant complained to her supervisors on many occasions but, no action was taken. The behavior grew worse and she went home stressed out. As appellant left, the employees applauded loudly.

On October 4, 2007 appellant requested an oral hearing before an Office hearing representative regarding the September 25, 2007 decision.

By decision dated January 9, 2008, an Office hearing representative found that the case was not in posture for decision and set aside the September 25, 2007 decision. She remanded the case to the Office for consideration of the factual and medical evidence submitted by appellant.

In a January 29, 2008 letter, the Office requested that the employing establishment respond to appellant's allegations. By letter dated January 31, 2008, it requested that appellant submit all documentation related to her EEO complaint.

A January 3, 2006 final interview issued by the employing establishment's EEO dispute resolution office denied appellant's claim alleging that her complaints of sexual harassment were ignored by a supervisor and that a hostile work environment was created by her coworkers and went uncorrected by a supervisor. It found that she was not entitled to lost wages, medical benefits and reassignment to a different office as requested. The decision found that Mr. Helfman never received appellant's sexual harassment complaints. He only received her complaints regarding loud noises made by carriers on the workroom floor. Appellant never advised management that she felt threatened by an employee or that she worked in a hostile

environment. She never complained to Postmaster McKeown about being sexually harassed. Postmaster McKeown stated that local and national policies on sexual harassment were clearly posted for all employees. He never received any correspondence from appellant containing complaints of loud noise or harassment by her coworkers.

In a March 18, 2008 letter, Assistant Postmaster Holper stated that there had never been a formal complaint against the employing establishment, Mr. Helfman or any supervisor. He noted that Mr. Helfman's work area tended to be loud before and after appellant worked in it. Assistant Postmaster Holper stated that she contributed to the relaxed atmosphere. When appellant's mood swings kicked in, no one wanted to be around her because they did not know what to expect from day to day. Assistant Postmaster Holper contended that the Newport Beach Post Office had always been considered one of the top offices in the district to work in and many employees were happy about transferring into it. He stated that appellant's performance was less than acceptable and that Mr. Helfman had to deal with her on a daily basis. Appellant was not well liked by her coworkers. She made inappropriate comments, such as asking Mr. Steaffens about his sexual preference. Assistant Postmaster Holper stated that appellant was a marginal employee.

By decision dated April 24, 2008, the Office found that appellant did not sustain an emotional condition in the performance of duty. The evidence failed to establish that she was sexually harassed, discriminated against or worked in a hostile environment.

On May 12, 2008 appellant requested an oral hearing.

Appellant submitted narrative statements dated August 5, 2008 from Ms. Moon, Becky Mitsueda, a former supervisor, and Mr. Herzog. Ms. Moon stated that Postmaster McKeown, Assistant Postmaster Jeff Aiello and Assistant Postmaster Holper referred to her as the most beautiful girl in the world. She witnessed them along with other managers refer to appellant as the most beautiful girl in the world's sister. Ms. Mitsueda stated that, as appellant's supervisor from 1994 to 1997, she and all the managers including, Postmaster McKeown, Assistant Postmaster Aiello, Assistant Postmaster Holper, Sheree Coates, Mr. Helfman, Jerry Ramirez, Cung Nguyen and Ms. Denamie were aware that appellant was constantly harassed on a daily basis which they found amusing. On numerous occasions she witnessed managers discuss and ridicule appellant. Mr. Herzog stated that Mr. Rocco made animal noises and grunting sounds on a daily basis. They were loud enough to be heard throughout the entire office. Mr. Herzog witnessed how upset appellant became which fueled more employees to make noise. Appellant confided in Mr. Herzog that she was being sexually harassed by the noises and grunts.

In a November 18, 2008 letter, Pamela R. Richardson, an employing establishment health and resource management specialist, controverted appellant's claim. She contended that appellant's hearing testimony was embellished and false as she denied having filed a prior claim. The statement of Ms. Moon, appellant's sister, and statements of Ms. Mitsueda and Mr. Herzog, and appellant's hearing testimony generally alleged past incidents of harassment but failed to provide any specific dates, times or locations. Ms. Richardson stated that appellant and her managers received sexual harassment training. She noted that Ms. Mitsueda and Ms. Moon had been in receipt of workers' compensation benefits since November 27, 2002 and November 20, 2000, respectively and had stopped working at the employing establishment prior to the filing of

appellant's 2007 claim. Ms. Richardson stated that Mr. Herzog did not follow the employing establishment's instructions for reporting sexual harassment as he did not advise a manager, supervisor, union official, EEO specialist or human resource manager that he witnessed and inappropriate sexual conduct, but was able to recall in detail every event that took place over a decade later and wrote a statement on appellant's behalf. She also stated that appellant had filed two claims, OWCP File Nos. xxxxxx176 and xxxxxx150, prior to the instant claim.

In a November 13, 2008 letter, Assistant Postmaster Aiello denied swearing or making fun of appellant. Postmaster Aiello stated that appellant's attitude, attendance and performance were well below acceptable.

In a December 16, 2005 narrative statement, Mr. Helfman related that at the end of September 2005 appellant advised him that she heard loud conversations between carriers. On October 1, 2005 he heard an employee make a shushing sound which appellant had pointed out to him. Appellant went home following this incident. Mr. Helfman related that employee talks were held on sexual harassment which was not tolerated and that he treated employees equally. Mr. Helfman was never informed about or observed any sexual harassment as alleged by appellant. If so, he would have addressed it immediately. Mr. Helfman denied creating a hostile work environment and finds that appellant never told him that she felt threatened by anyone.

In an undated narrative statement, Mr. Evans denied working close to, touching, talking to or harassing appellant.

In a December 3, 2008 letter, appellant's attorney stated that the submitted witness statements were not coached and contended test the employing establishment harassment training and policies did not prevent the alleged incidents from occurring.

By decision dated January 6, 2009, an Office hearing representative affirmed the April 24, 2008 decision, finding that the evidence failed to establish a compensable factor of employment.

LEGAL PRECEDENT

A claimant 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 adversely affected by factors of his federal employment.² To establish that she sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; (2) medical evidence establishing that she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.³

² *Pamela R. Rice*, 38 ECAB 838 (1987).

³ *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,⁴ the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Act.⁵ 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 under the Act.⁶ When an employee experiences emotional stress in carrying out her employment duties and the medical evidence establishes that the disability resulted from her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of her work.⁷ 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 under the Act.

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.⁸ 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.⁹

Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. 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.¹⁰ Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act.¹¹

⁴ 28 ECAB 125 (1976).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

⁷ *Lillian Cutler*, *supra* note 4.

⁸ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁹ *Id.*

¹⁰ *Lillian Cutler*, *supra* note 4.

¹¹ *Michael L. Malone*, 46 ECAB 957 (1995).

However, an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.¹²

ANALYSIS

Appellant did not attribute her emotional condition to her regular or specially assigned duties of being a letter carrier. Rather, she attributed her emotional condition to being sexually harassed, humiliated and verbally abused by Postmaster McKeown, Assistant Postmaster Holper, Assistant Postmaster Aiello, Mr. Helfman, Mr. Ayalla, Mr. Rocco, Mr. Jones, Mr. Moss, Mr. Steaffens and Mr. Evans which created a hostile work environment. Appellant contended that Postmaster McKeown, Assistant Postmaster Holper, Mr. Jones, Mr. Moss and Mr. Evans referred to her as being beautiful. She stated that Assistant Postmaster Hopler did not believe that his comment that she was the most beautiful girl in the world's sister constituted sexual harassment because he knew her sister, Ms. Moon. Appellant contended that Mr. Moss asked her to bring a picture of herself to confirm his belief that she was not only "hot" at that time, but also when she was young. She stated that he brushed up against her and stuck out his tongue pretending to lick his lips. Appellant related that Ms. Denamie made her and Mr. Moss hug one another after she complained that she was being sexually harassed by him. She contended that Mr. Steaffens walked around the work area moving his hips like a woman and mimicking her voice. Appellant further contended that Mr. Evans put his arm around her. She was teased by employees because she was unable to perform difficult work duties. Appellant became upset when they made shushing sounds which caused her to leave work. As she left, the employees applauded loudly. Appellant stated that employees shot rubber bands and threw balls across the room. She contended that Mr. Rocco made loud grunting noises and animal sounds. Appellant stated that Mr. Helfman denied hearing any noises. Mr. Helfman told her that Mr. Rocco could do what he wanted because unlike her, he was able to complete his route in eight hours. He also criticized appellant's work and threatened to fire her without giving her union representation. Appellant contended that Mr. Ayalla responded with profane language when she informed him about her physician's recommendation that she remain off work due to an April 7, 2000 work-related back injury. Mr. Ayalla told her that he could talk to her any way he wished. Appellant contended that the union, Mr. Helfman and Assistant Postmaster Holper failed to respond to her harassment complaints.

The Board notes that harassment or verbal abuse may give rise to coverage under the Act. However, there must be evidence that harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.¹³ Appellant failed to submit sufficient evidence to establish her allegations that she was sexually and verbally harassed. Although she stated that Mr. Ramirez, Mr. Nguyen and Jeanie observed Mr. Ayalla use profane language towards her, appellant did not submit any

¹² *Charles D. Edwards*, 55 ECAB 258 (2004).

¹³ *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, *supra* note 3 (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, *supra* note 2 (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

witness statements from them to establish the incidents as alleged. The Board finds that appellant has not established a factual basis for her allegations and it is not a compensable factor.¹⁴

Mr. Herzog stated that he witnessed appellant being harassed by employees including, Mr. Rocco, who shouted comments about her across the workroom floor, mocked how she walked and talked, and made noises and applauded when she entered and left the work area. Ms. Moon stated that she observed Postmaster McKeown, Assistant Postmaster Aiello and Assistant Postmaster Holper refer to appellant as the most beautiful girl in the world's sister. Ms. Mitsueda observed managers discuss and ridicule appellant. She stated that Postmaster McKeown, Assistant Postmaster Aiello, Assistant Postmaster Holper, Ms. Coates, Mr. Helfman, Mr. Ramirez, Mr. Nguyen and Ms. Denamie knew that appellant was harassed on a daily basis. The Board finds that these statements are insufficient to establish sexual harassment and verbal abuse on the part of appellant's coworkers and supervisors. Neither Mr. Herzog nor Ms. Mitsueda identified any specific comments made by appellant's coworkers to be considered compensable. Further, Ms. Mitsueda did not state that appellant was present when the comments were made. Moreover, the statements of Mr. Herzog and Ms. Moon regarding the comments and noises made by appellant's coworkers and supervisors do not reflect an intent to sexually harass or verbally abuse her. Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.¹⁵ The Board finds that the statements of Mr. Herzog, Ms. Moon and Ms. Mitsueda do not establish a pattern of harassment or verbal abuse of appellant by employees and supervisors.¹⁶

Assistant Postmaster Holper denied creating a hostile work environment. He stated that his office was considered to be one of the top offices to work in the district and that transfer employees were happy to work there. Assistant Postmaster Holper stated that appellant's work area was loud before and after she worked in it. He advised that she contributed to the relaxed work atmosphere by inappropriately asking Mr. Steaffens about his sexual preference. Assistant Postmaster Holper advised that appellant's work performance was less than acceptable which required monitoring by Mr. Helfman on a daily basis. He related that she was only provided an opportunity to work at the employing establishment because she was related to a former staff member of Postmaster McKewon.

Ms. Richardson stated that neither Ms. Moon nor Ms. Mitsueda had worked at the employing establishment for several years prior to the filing of appellant's emotional condition claim. She also stated that Mr. Herzog failed to follow the employing establishment's procedures on reporting sexual harassment as he did not report that appellant was being sexually harassed to management, a union official or an EEO specialist.

¹⁴ *James E. Norris*, 52 ECAB 93 (2000).

¹⁵ *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

¹⁶ *See Alfred Arts*, 45 ECAB 530, 543-44 (1994).

Assistant Postmaster Aiello denied calling appellant beautiful. He stated that he only referred to her by her first or last name. Assistant Postmaster Aiello also denied swearing or making fun of appellant. He stated that her attitude, attendance and work performance were well below acceptable.

Although Mr. Helfman stated that he heard an employee making a shushing sound that appellant pointed out to him, he denied creating a hostile work environment. He treated employees equally. Mr. Helfman stated that talks were held about sexual harassment and that such behavior was not tolerated by the employing establishment. He advised that appellant never told him that she was sexually harassed or threatened by an employee. If she had done so, Mr. Helfman would have addressed the matter immediately. Mr. Evans denied working close to, touching, talking to or harassing appellant.

Based on the statements of Assistant Postmaster Holper, Ms. Richardson, Assistant Postmaster Aiello, Mr. Helfman and Mr. Evans, the Board finds that appellant has failed to establish that she was sexually harassed and verbally abused by employees and supervisors. Therefore, she has failed to establish a compensable factor of employment.

The filing of an EEO complaint appellant alleging sexual harassment and stressful working conditions relates to administrative and personnel matters.¹⁷ The Board has held that EEO complaints and grievances, by themselves, do not establish wrongdoing by an employing establishment.¹⁸ In this case, appellant's complaints were denied by the EEO and employing establishment. There is no decision in the case record from the EEO finding error or abuse by the employing establishment in any of the alleged incidents. Moreover, the employing establishment's decision did not find error or abuse by the employing establishment in any of the alleged incidents. The Board finds, therefore, that the evidence related to appellant's complaints is not sufficient to establish a compensable factor of employment. Because appellant failed to establish a compensable employment factor, the Office properly denied her occupational disease claim.

CONCLUSION

The Board finds that appellant has failed to establish that she sustained an emotional condition in the performance of duty.

¹⁷ *Michael A. Salvato*, 53 ECAB 666, 668 (2002).

¹⁸ *Charles D. Edwards*, 55 ECAB 258 (2004).

ORDER

IT IS HEREBY ORDERED THAT January 6, 2009 and April 24, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 8, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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