United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 09-1194**
	)	**Issued: May 13, 2010**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Memphis, TN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 6, 2009 appellant filed a timely appeal of the January 28 and March 23, 2009 merit 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(d)(2), 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 May 30, 2008 appellant, then a 36-year-old supervisor of distribution operations (SDO), filed a claim alleging anxiety, depression and panic attacks due to her federal employment. She became aware of her condition and its relationship to her employment on

January 17, 2008. Appellant stopped work on January 9, 2008 when placed in a nonduty emergency status by Deloris R. Robinson, an SDO.[1]

The record reflects that the employing establishment conducted an investigation into time entries appellant and a coworker made in their capacity as supervisors. It brought an action for proposed removal, specifying that, on December 23, 2007, appellant entered 12 hours of unauthorized time without knowledge or consent of the proper authority for Vernita Edwards, an SDO, for December 15, 2007, a scheduled day off. Therefore, Ms. Edwards received payment for time not worked. On the same date, she entered 12 hours of unauthorized time for appellant for December 20, 2007, her scheduled day off. Appellant also received payment for time not worked.

In statements submitted to the record, appellant noted that she entered the time for Ms. Edwards, who told her it was missing. She contended that she received authorization from Charlie Payne, a manager of distribution operations (MDO). Appellant denied any knowledge of the 12 hours entered on her behalf by Ms. Edwards. She contended that the investigation was erroneously conducted in that she was not provided with certain information and was denied due process.[2] Appellant also alleged that other supervisors had similarly entered time for employees on days off but were either not investigated or disciplined. She filed a complaint with the Equal Employment Opportunity (EEO) Commission concerning the investigation and discipline.

Appellant also alleged retaliation and discrimination based on a 2006 EEO complaint action she filed against Aaron Lewis a labor relations specialist, concerning his promotion of Ms. Robinson to a supervisory position. Based on this action, she alleged bias and retaliation by Mr. Lewis and Ms. Robinson. Appellant alleged that the position was filled without going through the competitive process.[3] She alleged error and abuse regarding the time entries, contending that she was covered under the Family and Medical Leave Act while on leave and was owed time.[4] Appellant alleged error on the part of Vanessa B. Robinson, the acting lead manager, who ordered the investigation and conducted the May 27, 2008 investigative interview. She contended that she was denied a fair chance to mediate the matter. Appellant also noted that her pay was erroneously suspended from January 12 to 25, 2008. She alleged error on the part of

[1] In a January 10, 2008 letter, appellant was notified that she was suspended for cause in that she inputted time for herself and others and received compensation to which she was not entitled. It noted that an investigation was being conducted by the Office of Inspector General (OIG).

[2] Appellant alleged that she was subjected to multiple interviews during the investigation instead of one and received four forms of disciplinary actions. She alleged error on the part of Ms. Robinson's participation at a February 8, 2008 interview. Appellant also alleged discrimination based on sex and race.

[3] Appellant identified Ms. Robinson and Vivian Terry, a coworker, as having joint membership in a social organization to which she did not belong as a reason for disparate treatment and animus on the part of Ms. Robinson. She related that Ms. Terry had been disciplined but allowed to return to work.

[4] Appellant submitted e-mails dated September 30 to November 19, 2007 pertaining to leave requests submitted for Labor Day, Columbus Day, Veterans Day and Thanksgiving.

Deloris R. Robinson in taking her off the clock on January 9, 2008 and by discussing the investigative meetings with others.[5]

On July 28, 2008 Kenneth Gourdine, the plant manager, found that the charges brought were supported by the evidence. He noted that, as a relief supervisor for Ms. Edwards on her days off, appellant should have known that she had not worked on December 15, 2007. Further, Ms. Edwards had retired before discipline could be initiated against her. Mr. Gourdine considered her argument that the 12 hours of time entered for December 20, 2007 was payment for time worked on Labor Day and other missed work hours. He noted, however, that appellant had worked six hours on Labor Day and had requested annual leave in lieu of work hours. Mr. Gourdine found that this did not serve as a defense for appellant's improper time entry. He found the charge of improper conduct was sustained. In lieu of appellant's 14-year tenure, Mr. Gourdine reduced the proposed removal to a reduction in grade. She was removed from her supervisory position to a full-time regular sack sort keyer effective August 1, 2008. Appellant was advised as to her appellate rights to the Merit Systems Protection Board (MSPB).[6]

In support of her claim, appellant submitted statements from several coworkers. Ms. Edwards advised on April 8, 2008 that Deloris R. Robinson had been mean to appellant.[7] She noted that Deloris R. Robinson was subsequently promoted by Mr. Gourdine to a position with increased pay.[8] Ms. Edwards contended that appellant had told the truth about time entries being made for employees by other supervisors. She stated that she was a former member of a social organization to which Deloris R. Robinson belonged and alleged that the group performed special favors for one another. Ms. Edwards also related that David Ray, MDO, did not believe that appellant got a fair deal.[9]

In a June 19, 2008 handwritten note entitled Interview Mr. Ray, Cleve Standifer wrote that Mr. Ray had a document showing that appellant mentioned the time impute involving Ms. Edwards to Mr. Payne.[10]

In a July 21, 2008 letter, Mr. Lewis denied any knowledge of an EEO complaint filed against him regarding the selection of Deloris R. Robinson. He also denied appellant's allegations concerning disparate treatment of other employees or in discussing her attendance

[5] Appellant submitted medical reports dated May 29 to July 29, 2008 from Dr. Carla M. DaCunha, a Board-certified psychiatrist, who diagnosed recurrent major depressive disorder and panic disorder exacerbated by work factors. Dr. DaCunha advised that appellant was disabled for work.

[6] Appellant subsequently alleged that all her leave requests had been denied by Mr. Gourdine.

[7] She alleged the sexual assault of appellant during high school by a man whom Ms. Robinson was dating.

[8] On August 4, 2008 Mr. Gourdine responded that he had selected Deloris R. Robinson based on her past experience.

[9] Olden Abron, an employee, submitted a June 18, 2008 e-mail pertaining to a conversation overheard by another employee in which Vanessa B. Robinson purportedly requested Mr. Ray, an MDO, to sign a letter of removal regarding appellant. The Board notes that the January 10, 2008 emergency suspension letter was signed by Mr. Payne.

[10] The note was not signed by Mr. Ray.

problems. Mr. Lewis stated that Ms. Terry was returned to work after a discussion with the employing establishment's legal counsel, managers and a labor relations specialist. He denied making any administrative decisions involving Ms. Terry or Ms. Edwards based on their affiliation with any social organization. Mr. Lewis had recommended the removal of Ms. Edwards but she retired before any disciplinary action could take place.

On July 16, 2008 Deloris R. Robinson stated that as a labor relations specialist she was required to perform preliminary investigations. On December 31, 2007 she was asked by Vanessa B. Robinson to investigate allegations that appellant inappropriately entered time and received compensation. On January 5, 2008 Vanessa B. Robinson instructed her to remain on duty while officers with the inspector general interviewed appellant, which resulted in Mr. Payne placing appellant in a nonduty status. Deloris R. Robinson stated that she had no authority to make such a decision. Her role was to ensure that appellant was provided due process. Deloris R. Robinson noted that she also instructed her to attend a May 27, 2008 investigative interview.

In a July 22, 2008 letter, Vanessa B. Robinson stated that, as the acting lead manager, she was responsible for overseeing day-to-day operations. In December 2007, she received information concerning time and attendance improprieties involving appellant. Vanessa B. Robinson instructed Mr. Payne to investigate the matter and appellant was initially interviewed on December 31, 2007. She sat in on the interview with Deloris R. Robinson. It was determined that the matter would be investigated by the OIG. Thereafter, appellant was called in for an interview on May 27, 2008, which Deloris R. Robinson conducted. She was afforded the opportunity for representation and asked to respond to facts found by the OIG. Appellant declined representation during the interview. Ms. Robinson noted that appellant was very familiar with the question and answer format of the interview since she had conducted interviews of her own employees.

On August 1, 2008 appellant requested that the employing establishment reconsider the July 24, 2008 disciplinary action. She reiterated her allegations of due process violations, contending that Vanessa B. Robinson was not her immediate manager. Appellant stated that she had been subject to multiple forms of discipline and that the decision was predetermined. She further contended that she did not receive pay for hours worked on September 3, November 9 and December 11, 2007.

By decision dated January 28, 2009, the Office denied appellant's claim, finding that she did not sustain an emotional condition in the performance of duty. The evidence was insufficient to establish a compensable factor of her employment.

On February 5, 2009 appellant requested reconsideration. She submitted materials pertaining to her prior allegations concerning the selection of Deloris R. Robinson for an SDO position with top pay without competition and her participation in the May 27, 2008 investigative interview. She submitted the cover sheet of a November 13, 2008 settlement agreement from the MSPB. It stated that appellant's claim concerning her demotion had been settled with prejudice.

By decision dated March 23, 2009, the Office denied modification of the January 28, 2009 decision. It found that appellant 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 her federal employment.[11] 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.[12]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In *Lillian Cutler*,[13] the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[14] 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.[15] 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.[16] 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. 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.[17]

In *Thomas D. McEuen*, the Board held that actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned

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

[12] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

[13] 28 ECAB 125 (1976).

[14] 5 U.S.C. §§ 8101-8193.

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

[16] *Lillian Cutler*, *supra* note 13.

[17] *Id.*

work duties, do not fall within coverage of the Act.[18] However, an administrative or personnel matter will be considered a compensable employment factor where the evidence discloses error or abuse on the part of the employing establishment managers or supervisors.[19]

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.[20] 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.[21] If the employee fails to establish a compensable work factor, the medical evidence need not be considered.[22]

ANALYSIS

Appellant contends that the investigation into time entries she made on behalf of a coworker was erroneous and abusive. She also contends that the discipline she received as a result of the investigation, being suspended as of January 9, 2008 and reduced in position effective August 1, 2008, was similarly erroneous and disproportionate to the discipline given other employees. The Board notes that appellant's allegations pertain to administrative actions taken by certain managers and supervisors at the employing establishment. Appellant has not alleged any compensable factor under *Cutler* pertaining to her regular or specially assigned duties.

Appellant alleged that the employing establishment investigation of the time reporting entries made by Ms. Edwards and herself on December 23, 2007 was erroneous. She explained that she made the entry because Ms. Edwards asked her to input missing time. Appellant contended that it had been verified and approved by Mr. Payne. She stated that she had no knowledge that Ms. Edwards had entered time on her behalf and alleged that such entries were routinely made by supervisors for employees. Appellant alleged error on the part of Deloris R. Robinson in placing her in a nonduty status as of January 9, 2008, questioned Ms. Robinson's participation at several of the investigative interviews and alleged harassment and animus by

[18] 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991). *See also Michael L. Malone*, 46 ECAB 957 (1995).

[19] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *see Faye Cardwell*, *supra* note 12 (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *see Pamela R. Rice*, *supra* note 11 (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

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

[21] *Id.*

[22] *See Karen K. Levene*, 54 ECAB 671 (2003).

Ms. Robinson based on involvement in a local social organization and where appellant had gone to high school. She contended that she was owed money for time worked over various holidays and that her absences from work were covered under the Act.

Appellant alleged error as to the multiple interviews held from December 31, 2007 to May 27, 2008. She stated that her due process rights were violated and that she answered the same questions over and over again. Appellant contends that Vanessa B. Robinson failed to follow proper procedures in conducting meetings and issuing the notice of proposed removal, which was unnecessary as she had been cleared of any wrongdoing by Mr. Ray. Ms. Robinson also failed to provide the opportunity for a fair mediation of the matter prior to the July 28, 2008 decision of Mr. Gourdine. Appellant alleges error in her demotion from a supervisory position to a sack sorter keyer.

Appellant characterized herself as being subjected to multiple disciplinary actions for the same charge while the usual practice involved one investigative interview and one disciplinary action. Her pay was suspended during the investigation from January 12 to 25, 2008 and she listed several other days that she was not paid prior to her suspension. Appellant contends that her requests for documents related to the investigation were improperly denied and alleged a general pattern of harassment although cleared of any wrongdoing. She filed an EEO complaint regarding the investigation and discipline. Appellant noted bringing a 2006 EEO complaint against Mr. Lewis for promoting Deloris R. Robinson. She noted that Mr. Lewis had not previously supported her recommendation to discipline an employee for having severe attendance problems, alleging a disparity in the discipline she received for the time entry infraction.

The Board notes that appellant's allegations pertain largely to the administrative actions taken by management personnel at the employing establishment in the investigation and discipline pertaining to the December 23, 2007 time entries. It is well established that investigations into possible employee wrongdoing and discipline pertain to actions taken in an administrative capacity and do not relate to the regular or specially assigned duties of the employee.[23] An employing establishment retains the right to investigate an employee if wrongdoing is suspected or as part of an evaluation process.[24] In such instances, the investigation and discipline are not compensable factors unless the evidence establishes error or abuse in the process. Appellant has not submitted sufficient evidence to establish that the investigation of the time entries or discipline she received was erroneous or abusive in nature.

As noted, appellant submitted several witness statements in support of her allegations of error and abuse. Ms. Edwards stated that Deloris R. Robinson had been mean to appellant in the past and disliked her based on various factors such as the social organization to which she belonged. Appellant also noted that Ms. Robinson had been promoted by Mr. Gourdine following appellant's suspension. Ms. Edwards stated that appellant's contentions regarding time entries made by other supervisors for employees were true. This evidence is not sufficient

[23] *Jeral R.Gray*, 57 ECAB 611 (2006); *Joe M. Hagewood*, 56 ECAB 479 (2005).

[24] *Sandra F. Powell*, 45 ECAB 877 (1994). An employee's fear of being investigated is generally not covered under the Act unless error or abuse is established. *See Garry M. Carlo*, 47 ECAB 299 (1996).

to establish error or abuse on the part of Ms. Robinson or other employing establishment personnel as it pertains to the investigation of appellant and Ms. Edwards for the December 23, 2007 time entries.

The record establishes that disciplinary proceedings were instituted regarding the entries of both appellant and Ms. Edwards; however, she fortuitously retired before any action could be taken. Her statement largely ignores their actions of December 23, 2007 and resulting investigation. Rather, she impugned the character of the manager who processed appellant's suspension on January 9, 2008 and participated in several of the investigative interviews. Deloris R. Robinson noted that as a labor relations specialist she was responsible to perform preliminary investigations and had been asked by Vanessa B. Robinson on December 31, 2007 to investigate the entries of appellant and Ms. Edwards. On January 5, 2008 she was instructed to remain on duty while officers interviewed appellant, resulting in the emergency suspension signed by Mr. Payne. Deloris R. Robinson noted that she had no authority to take the action suspending appellant from work and that she was involved to assure that due process was provided. She was similarly instructed to attend the May 27, 2008 interview. The statements of record from Ms. Edwards regarding the actions of Deloris R. Robinson are not sufficient to establish managerial error or abuse in these matters. She was not present at the employing establishment following her retirement and had no participation in any of the actions taken. The evidence does not establish that Deloris R. Robinson exercised undue influence on Mr. Payne to have appellant suspended as of January 9, 2008. The statements of Ms. Edwards are insufficient to establish that other supervisors routinely made such entries or that appellant was singled out for discipline, as alleged.

Ms. Edwards also stated that Mr. Ray did not believe that appellant got a fair deal. Appellant has contended on appeal that she was exonerated of the charges by Mr. Ray. Mr. Abron provided a statement describing a conversation overheard by a third party in which Vanessa B. Robinson had requested Mr. Ray to sign the letter of removal and he refused. It is not established that Mr. Abron was a participant involved in any investigative or disciplinary action at the employing establishment. Therefore, his account must be taken as second-hand, at best. Also, there is no statement from Mr. Ray. Appellant submitted a June 19, 2008 handwritten note purportedly of an interview involving Mr. Ray; however, it is signed by Mr. Standifer. It cannot be accepted as reflecting Mr. Ray's knowledge of the circumstances. There is no evidence that appellant advised Mr. Payne of the time entries she made on the behalf of Ms. Edwards or that he authorized such action. Even assuming that Mr. Ray had initially refused to sign the letter of removal, there is no evidence that the suspension or discipline of appellant was in error. On July 28, 2008 Mr. Gourdine, the plant manager, found that the charges were supported by the OIG investigation. He noted that Ms. Edwards retired before discipline could be initiated against her and found that appellant's arguments concerning any possible time she was owed did not explain the improper entries she made for Ms. Edwards. Mr. Gourdine upheld the charge of improper conduct, reducing the proposed removal to a reduction in grade from her supervisory position. It is well established that the fact that a personnel action is modified does not establish error or abuse.[25] Mr. Gourdine noted that Deloris R. Robinson was subsequently selected for another position based on her past experience

[25] *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

and denied appellant's allegations of favoritism in the selection process. The evidence submitted by appellant is not sufficient to establish her allegations of error, retaliation or discrimination, as alleged.

Similarly, Mr. Lewis denied appellant's allegations concerning prior employment decisions involving Deloris R. Robinson or in treating employees in a disparate manner. He noted that his decisions were not premised on the affiliation that employees had with any social organization. Mr. Lewis recommended the removal of Ms. Edwards but noted that she retired before any disciplinary action was taken. This evidence does not establish that appellant was treated in a disparate manner or harassed based on the reduction in grade she received. Appellant contended that Ms. Terry, a coworker, had been disciplined but allowed to return to work. It is not readily apparent that Ms. Terry was a supervisor disciplined for the same infraction of making improper time entries. Moreover, appellant was also allowed to return to work, albeit at a reduction in grade. The evidence does not establish that appellant was singled out or treated in an erroneous or abusive manner in the discipline she received based on the December 23, 2007 time entries.

Vanessa B. Robinson also disputed appellant's allegations of error or abuse in the manner by which the investigation was conducted, certain documents were prepared or in several meetings with appellant. She noted being responsible for overseeing the day-to-day operations of two tours in distribution operations and described receiving information concerning time and attendance improprieties involving appellant. Ms. Robinson instructed Mr. Payne to conduct a preliminary investigation, with an initial meeting conducted with appellant on December 31, 2007. It was later determined that the OIG would investigate the matter and appellant was called in for interviews. With reference to the May 27, 2008 interview, Ms. Robinson noted that she engaged in a question and answer format concerning appellant's response to certain facts found in the OIG report. She also asked that Deloris R. Robinson be present during the interview. This evidence does not support appellant's allegations of error or abuse on the part of Vanessa B. Robinson. She argued that Vanessa B. Robinson was not her immediate manager but such contention is not germane to the investigation of her improper time entries and discipline. The record supports that Vanessa B. Robinson, among others, was an up-line manager with responsibility for such matters within the employing establishment. The evidence does not support appellant's characterization of the investigation as subjecting her to multiple forms of discipline, harassment or that she was denied due process. It is readily apparent that her employer notified her that she was suspended for cause and that an investigation into the time entries would be made. It subsequently conducted several interviews prior to and after the investigation by the OIG. Appellant was advised on June 5, 2006 of the notice of proposed removal following mediation with Vanessa B. Robinson and of the July 28, 2008 decision by Mr. Gourdine. Based on her 14 years with the employer, he reduced the proposed removal to a reduction in grade from her supervisory position. Her response to this action was similar to that of Ms. Edwards, to impugn the character of the supervisors and managers involved in the investigation through allegations of harassment and discrimination that are not substantiated by the evidence of record. It is readily apparent that appellant was not exonerated for the improper time entries, as alleged. Instead, she raised charges of harassment, discrimination, retaliation and disparate treatment as motive by various supervisory personnel

involved in the investigation and the disciplinary proceedings.[26] The cover letter of the MSPB November 13, 2008 settlement agreement regarding appellant's reduction in grade does not establish that the employing establishment committed error or abuse in handling the investigation or discipline.[27] For these reasons, the Board finds that appellant has failed to substantiate her allegations. She did not submit sufficient evidence to establish a compensable factor of employment.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 23 and January 28, 2009 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: May 13, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

[26] The term "harassment" as applied by the Board is not the equivalent as the term is defined or implemented by other agencies, such as the EEO or MSPB, which are charged with statutory authority to investigate such matters and personnel actions within the workplace. In evaluating claims for workers' compensation, the Board evaluates the evidence to determine if allegations of mistreatment by coemployees are substantiated by the evidence of record. *See Ronald K. Jablanski*, 56 ECAB 616 (2005).

[27] *D.L.*, 58 ECAB 217 (2006) (the record contained no EEO decision or settlement agreement containing findings of error or abuse by employing establishment personnel. Thus, the Board found the evidence insufficient to establish a compensable employment factor).