

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

G.M., Appellant

and

**U.S. POSTAL SERVICE, BAY CITY ANNEX,
Manhattan Bench, CA, Employer**

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**Docket No. 11-1429
Issued: January 6, 2012**

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 May 23, 2011¹ appellant filed a timely appeal of a November 26, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her emotional condition claim. Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

¹ Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. See 20 C.F.R. § 501.3(f)(2). As OWCP's merit decision was issued on November 26, 2010, the 180-day computation begins on November 27, 2010. One hundred and eighty days from November 27, 2010 was May 25, 2011. Since using June 1, 2011, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is May 23, 2011, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met her burden of proof to establish that she developed an emotional condition in the performance of duty due to factors of her federal employment.

On appeal, appellant alleged that the evidence of record established that her emotional condition occurred in the performance of duty.

FACTUAL HISTORY

On October 6, 2003 appellant, then a 46-year-old clerk, filed an occupational disease claim, alleging that she developed chest pain and heart palpitations due to harassment by management. She stated that her light-duty assignment was cancelled, that she had to file a complaint against a coworker, who was harassing her and that management kept adding duties to her job assignment. In a form report dated October 6, 2003, Dr. Accis Mitchell, a family practitioner, diagnosed chest pain and palpitation and recommended stress reduction therapy. He indicated with a checkmark "yes" that this condition was caused or aggravated by an employment activity.

The employing establishment responded to appellant's allegations on October 16, 2003. It noted that she complained that another employee was harassing her by making comments about the kind of work she was doing. The employing establishment stated that management immediately reprimanded the coworker. It advised that appellant's light-duty position was not revoked. Appellant failed to provide medical evidence of her work restrictions although disciplinary action was taken against her. She eventually stopped coming to work and entered a leave without pay status on June 16, 2003.

The employing establishment requested a medical report supporting appellant's light-duty assignment by letters dated January 24, 2002 and May 9, 2003. On August 28, 2003 the employing establishment suspended appellant for seven days beginning September 15, 2003 due to unsatisfactory job performance through failure to follow instructions in providing medical documentation. Appellant also received disciplinary letters of warning on March 14, 2001, January 24 and June 30, 2003 for failure to provide medical documentation.

OWCP requested additional factual and medical evidence in a letter dated November 13, 2003.

By decision dated March 16, 2004, OWCP denied appellant's claim finding that she failed to establish a compensable factor of employment.

On March 23, 2004 appellant requested a review of the written record.

In a letter dated June 21, 2004, the employing establishment stated that appellant's light-duty assignment was not cancelled due to her complaints about harassment; rather she failed to provide medical documentation as instructed and utilized sick leave instead. Appellant's harassment allegation was not dismissed and management dealt with the employee and no other problems were reported. The employing establishment stated that she had a nonwork-related

knee injury. It reiterated that appellant did not submit any medical evidence regarding her shortness of breath and chest pain on May 19 to July 2003.

The employing establishment issued a notice of 14-day suspension on December 16, 2003 noting that appellant had not reported to work since June 16, 2003 or provided any medical documentation. On February 23, 2004 it noted receiving her medical documentation for osteoarthritis of the right knee and varicose veins and a work restriction of no prolonged standing. The employing establishment requested additional medical evidence and stated that a light-duty assignment would be available.

Appellant submitted a letter received on July 2, 2004 contending that her claim for harassment should have been accepted by OWCP. She alleged that her employing establishment made false statements regarding the disciplinary actions and administrative error in referencing her nonwork-related injury.

By decision dated August 30, 2004, OWCP's hearing representative affirmed the March 16, 2004 decision.

Appellant requested reconsideration on August 28, 2005. She alleged that the employing establishment erred in disciplinary actions, improperly dismissed her allegation of harassment and that her male supervisor, Herbert Belt, sexually harassed her and created a hostile work environment. Appellant alleged several false and misleading statements. She submitted a response to a proposed removal, stating that she would return to work within her restrictions. On September 3, 2004 the employing establishment provided appellant with a notice of separation effective October 4, 2004.

Appellant submitted notes dated August 3 and September 1, 2004 diagnosing chronic lumbosacral strain with right radiculopathy, right knee degenerative joint disease and anxiety disorder with depression. Dr. Howard R. Bass, a Board-certified internist, advised that appellant was totally disabled.

In a December 1, 2005 decision, OWCP reviewed the merits of appellant's claim and denied modification of its prior decisions.

Appellant requested reconsideration on November 12, 2006. She submitted a witness statement from Vickie Trotter-Peterson, a coworker, dated August 31, 2005. Ms. Trotter-Peterson stated that Mr. Belt yelled and screamed at appellant all day. Appellant submitted statements dated February 18 and November 20, 2004 alleging that Mr. Belt solicited sexual favors from her, tampered with evidence and instituted claims of unsatisfactory work performance.

On January 15, 2004 the employing establishment responded, noting that appellant had submitted a letter alleging sexual harassment and retaliation by Mr. Belt. It stated that, as she did not sign the letter, it was unable to process the complaint.

Appellant submitted a report dated August 31, 2005 from Dr. Arnold P. Nerenbery, a clinical psychologist, who diagnosed panic disorder, major depression and anxiety disorder. Dr. Nerenbery alleged that a witness supported her claim for sexual harassment by Mr. Belt.

By decision dated March 2, 2007, OWCP reviewed the merits of appellant's claim and denied modification of her prior decisions.

Appellant requested reconsideration on February 12, 2008. She continued to allege wrongdoing on the part of the employing establishment.

By decision dated January 29, 2010, OWCP reviewed the merits of appellant's claim and denied modification of its prior decisions.

Appellant requested reconsideration on August 10, 2010. She alleged error in the employing establishment disciplinary actions and in her removal from it.

By decision dated November 26, 2010, OWCP reviewed the merits of appellant's claim and denied modification of its prior decisions.

LEGAL PRECEDENT

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*,³ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA.⁴ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.⁵ When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an 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 his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.⁶ In contrast, a disabling condition resulting from an employee's feelings of job insecurity *per se* is not sufficient to constitute a person injury sustained in the performance of duty within the meaning of FECA. Thus disability is not covered when it results from an employee's fear of a reduction-in-force, nor is disability covered when it results from such factors as an employee's frustration in not being permitted to work in a particular environment or to hold a particular position.⁷

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 FECA.⁸ Where the evidence

³ 28 ECAB 125 (1976).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See *Robert W. Johns*, 51 ECAB 136 (1999).

⁶ *Cutler*, *supra* note 3.

⁷ *Id.*

⁸ *Charles D. Edwards*, 55 ECAB 258 (2004).

demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.⁹ A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.¹⁰

For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under FECA. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹¹

ANALYSIS

Appellant alleged an emotional condition as a result of error and abuse in administrative matters and harassment and discrimination on the part of her manager. OWCP 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 FECA.

The Board notes that appellant's allegations do not pertain to her regular or specially assigned duties under *Cutler*.¹² Appellant alleged that she developed an emotional condition resulting in chest pain and heart palpitations due to harassment by her supervisor and coworkers. She also attributed her condition to cancellation of her light-duty assignment, erroneous disciplinary actions by the employing establishment and the continuous addition of duties to her light-duty assignment.

Appellant claimed sexual harassment by her supervisor, Mr. Belt, who allegedly requested sexual favors. The Board has held that a claimant must establish a factual basis for her allegations with probative and reliable evidence.¹³ Appellant has submitted insufficient evidence to establish sexual harassment. Dr. Nerenbery described the allegations of a witness, but the witness statement is not of record. The Board may not accord probative value to a statement without the opportunity to review it. As noted, in order to establish harassment there must be evidence that the acts alleged or implicated by the employee did in fact occur.¹⁴

⁹ *Kim Nguyen*, 53 ECAB 127 (2001). See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

¹⁰ *Roger Williams*, 52 ECAB 468 (2001).

¹¹ *Alice M. Washington*, 46 ECAB 382 (1994).

¹² *Supra* note 3.

¹³ *T.G.*, 58 ECAB 189 (2006).

¹⁴ *C.S.*, 58 ECAB 137 (2006).

Appellant alleged that a coworker made inappropriate comments about her work that constituted harassment. The employing establishment stated that she complained about statements made by a coworker and that the coworker was reprimanded. However, neither appellant nor the employing establishment provided specific information as to the statements made. She made a general allegation of inappropriate comments without a sufficient description of matter alleged. The evidence of record is not sufficient to establish a compensable factor of employment.¹⁵

Appellant submitted a statement from Ms. Trotter-Peterson dated August 31, 2005. She noted generally that Mr. Belt yelled and screamed at appellant regarding her work duties. This statement, also did not provide any detail as to what was stated. Ms. Trotter-Peterson did not address appellant's allegations of sexual harassment. To the extent appellant is alleging that she was verbally abused, the Board has generally held that being spoken to in a raised or harsh voice does not of itself constitute verbal abuse or harassment.¹⁶ The Board notes that the fact that a supervisor may have directed her in a raised tone of voice is insufficient, by itself, to warrant a finding that his actions amounted to verbal abuse as appellant did not show how a possible loud or raised voice in directing appellant to perform her duties, would rise to the level of verbal abuse or otherwise fall within the coverage of FECA.

Appellant has also alleged that the employing establishment improperly issued letters of warning, suspensions and other disciplinary actions. She also stated that it improperly added duties to her light-duty position and eliminated her limited-duty position. Allegations that the employing establishment engaged in improper disciplinary actions and improperly assigned work¹⁷ related to administrative and personnel matters, unrelated to regular and specially assigned work duties and do not fall within the coverage of FECA. These activities are administrative functions of the employing establishment and not duties of the employee.¹⁸ Appellant has the burden to establish error or abuse in these administrative actions in order to substantiate a compensable factor of employment. She has not submitted any witness statements, union documentation or other evidence supporting her allegations and arguments that the employing establishment erred in issuing discipline or in assigning work duties. For this reason, the Board finds that appellant has not established a compensable factor in this regard.

The Board finds that appellant has not submitted the necessary supportive factual statements from witnesses or other sources to establish her alleged employment factors of harassment, verbal abuse or error in disciplinary or work assignments. For these reasons, the Board finds that she has failed to meet her burden of proof in establishing an emotional condition arising in the performance of her federal duties.

¹⁵ *Peter D. Butt, Jr.*, 56 ECAB 117 (2004).

¹⁶ *Id.*

¹⁷ *Donney T. Drennon-Gala*, 58 ECAB 469 (2005).

¹⁸ *Butt*, *supra* note 15.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § § 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has failed to meet her burden of proof in establishing an emotional condition arising from her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 6, 2012
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