United States Department of Labor
Employees' Compensation Appeals Board

I.D., Appellant	)	
and	)	**Docket No. 16-0581**
	)	**Issued: December 12, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Georgetown, TX, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 8, 2016 appellant, through counsel, filed a timely appeal from a December 2, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof to establish an emotional condition in the performance of duty.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 22, 2014 appellant, then a 51-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained stress and depression causally related to factors of her federal employment.

In an undated statement, appellant related that her stress began on February 2012 when "Sup[ervisor] [A.M.] disseminated a sex video of both of us to coworkers." She subsequently found a threatening note placed on her case by E.O. Appellant asserted that she asked a supervisor, P.D., about pursuing a sexual harassment charge, but the supervisor told her "not to pursue due to opening up a can of worms." She also indicated that she was afraid individuals could access her work location because of a broken keypad on the door. Coworkers sent black roses to appellant's house to ruin her marriage. The investigation by the employing establishment strained her marriage. Appellant's husband received a letter from the wife of A.M. disclosing their affair on the date appellant testified against him in federal court. Appellant filed for divorce. She told the postmaster at that time about the threatening note and he yelled at appellant. Appellant found another threatening note on her vehicle. She advised that the employing establishment had terminated A.M., demoted P.D., and retired the postmaster due to the sexual harassment and hostile work environment. On December 19, 2013 J.C. did not turn off a public address system while speaking with appellant about her car being in the shop. On January 23, 2014 she sustained increased depression when E.O. was promoted to management.

The employing establishment acknowledged that it had issued A.M. a June 20, 2012 notice of proposed removal for unacceptable conduct. It advised that it had investigated allegations that in his positon as supervisor he had released a video depicting appellant and him engaged in a sex act. The employing establishment noted that the video was made on either December 26, 2009 or 2010. A.M. contacted appellant during work hours by telephone. Appellant also gave him gifts and checks. The employing establishment indicated that she was a subordinate employee.

In a decision dated April 10, 2013, an administrative judge with the Merit Systems Protection Board (MSPB) affirmed the employing establishment's removal of A.M. effective August 4, 2012. He found that the testimony of appellant and coworkers was credible and supported that A.M. "created a video of oral sex between himself and [appellant] and that he distributed it to other [employees] in the [employing establishment]." The judge further noted that A.M. texted her, a subordinate, during business hours, accepted checks and gifts from appellant, met her in the parking lot at work, and engaged in sexual intercourse with her while she was on duty.[3]

The employing establishment on January 28, 2014 advised that it had reported a broken door keypad to maintenance and noted that the door was locked from the inside. In a letter dated February 3, 2014, the Occupational Safety & Health Administration (OSHA), informed appellant that the employing establishment had resolved the identified hazard.

[3] The judge also found that A.M. acted inappropriately with other female coworkers.

In a statement dated April 4, 2014, J.C., the postmaster, related that she was not present when the video circulated of appellant and A.M. in May or June 2012. She advised that the employing establishment conducted an investigation and as a result terminated A.M. and demoted another supervisor. A year later appellant was to testify at a hearing when her husband received a letter revealing the affair. On December 18, 2013 she requested a vehicle to use on her route because her car was being repaired. A supervisor refused to give appellant a vehicle or grant her leave request. J.C. told appellant to come to work. She took appellant into her office and talked with her without realizing that the speaker was on for the public address system. J.C. related, "The conversation consisted of my explaining to [appellant] that she would have to provide a vehicle even if she needed to rent one and that she would not be granted leave." She also notified maintenance of the broken door lock and before it was fixed she "had the custodian stand by the door" to make sure there was no unauthorized entry.

The employing establishment, by letter dated April 7, 2014, related that appellant and A.M. engaged in a consensual relationship for more than two years. It advised that it investigated their actions and determined that the spouse of A.M. shared a video of the two of them engaged in oral sex. The employing establishment noted that appellant voluntarily made the video, but did not know that it would be released to others. Further, it advised that it timely fixed the broken door lock and that there was no OSHA violation. It also confirmed that the postmaster accidently left the public address system on when she spoke with appellant about the need to use her own vehicle. It maintained that it did not commit error or abuse in an administrative matter.

A coworker provided a March 16, 2014 statement indicating that he heard the conversation between appellant and J.C. over the intercom system.[4] He heard J.C. yelling at appellant and stating that appellant had to provide her own vehicle.

Appellant, in a statement dated April 22, 2014, attributed her condition to E.O. becoming a supervisor, managers saying E.O. should not be in management, a supervisor telling her to stop posting videos on Facebook, and J.C. leaving the intercom on when she was in her office.

In a decision dated September 2, 2014, OWCP denied appellant's emotional condition claim after finding that she had not established any compensable factors of employment. It found factually established that in February 2012 A.M. released a video of the two of them having sex, that P.D. told appellant not to pursue a claim of sexual harassment, and that the employing establishment investigated the matter in March 2012. OWCP further found as factually established that on December 19, 2013 J.C. did not turn off the PA system so employees heard the exchange of words and that a supervisor told her to stop posting videos on Facebook. It found that appellant did not establish that she received threatening notes, that the postmaster yelled at her about the notes, or that she was afraid due to the broken keypad.

On January 23, 2015 appellant requested reconsideration. In a March 19, 2012 interview as part of an investigation, she described her affair with A.M. from 2008 to 2011. Coworkers told appellant that they had received an inappropriate video of her and A.M. After appellant

[4] The last name of the coworker is not legible.

received threatening notes she told P.D. about the affair and that she was uncomfortable at work. The supervisor discouraged her from reporting the incident.

In a decision dated December 18, 2012, an administrative judge with MSPB affirmed the employing establishment's reduction of P.D.'s grade and pay effective August 11, 2012. The Judge found that P.D. had not adequately performed her duties as a supervisor. He noted that A.M. circulated to coworkers an inappropriate video of appellant and him engaged in oral sex. Appellant told P.D. that she was uneasy and felt harassed after the release of the video and also received a note on her case. The Judge found it had been established that P.D. should have reported the complaint and begun an investigation.

On October 28, 2014 the employing establishment denied appellant's request to obtain statements and other information, regarding the March 2012 investigation into the actions of a supervisor, under the Freedom of Information Act.[5]

Counsel, on April 2, 2015, maintained that the employing establishment acknowledged wrongdoing when it disciplined A.M. and P.D. He noted that an administrative judge found that credible testimony supported that A.M. made and distributed a video showing appellant having oral sex with him and upheld the employing establishment's termination of A.M. for cause. Counsel related that OWCP could obtain the evidence supplied by the employing establishment in "defending its decision to terminate [A.M.]." Citing *K.B.*,[6] he noted that the fact that coworkers had a relationship outside of work did not negate the possibility of sexual harassment in the workplace. Counsel also asserted that pursuant to *L.B.*,[7] the fact that the subject of the sexual harassment was unrelated to work did not remove it from compensability. He maintained that the employing establishment had the responsibility for actions taken by its managers. Counsel further noted that the employing establishment demoted P.D. as appellant "brought the issue of her hostile work environment to [P.D.] and [she] failed to act." The Judge found that appellant's testimony that P.D. told her that filing a claim would "open a can of worms" was credible. Counsel related:

> "[P.D.'s] failure to even investigate [appellant's] claim that she was being sexually harassed by [A.M.] and his friends constitutes error or abuse on the part of [the employing establishment]. While the determination of whether to investigate sexual harassment is an administrative function, the [employing establishment] clearly felt that [P.D.] had erred in failing to investigate given the circumstances."

[5] The employing establishment, in a letter dated January 28, 2015, again challenged appellant's claim, noting that she was responsible for her "illicit personal conduct…."

[6] Docket No. 11-0384 (issued April 6, 2012).

[7] Docket No. 06-1939 (issued January 30, 2007).

He noted that the employing establishment submitted a section of its manager's guide to MSPB advising that supervisors must respond to complaints of harassment as support for its demotion of P.D. Counsel concluded:

> "[Appellant] is responsible for her choices outside of work. However, she did not bring the video into the workplace nor did she disseminate it to all of her coworkers. That was done by [A.M.]. When [she] complained about the dissemination of the tape in her workplace as well as other harassing behaviors, her complaints were ignored -- in violation of [employing establishment] policy."

By decision dated December 2, 2015, OWCP affirmed as modified the September 2, 2014 decision. It reviewed MSPB's description of the testimony of appellant's coworkers at the April 10, 2013 MSPB hearing and found that it was insufficient to factually establish her allegation that A.M. released a video of them engaging in sex acts as it was hearsay. OWCP thus found that she had not established the alleged work incident.

On appeal counsel notes that an administrative judge at the MSPB found that she had factually established her allegation that A.M. made and distributed the video based on the testimony of coworkers. He also maintains that the employing establishment used this action as the basis for its dismissal of A.M. Counsel indicates that A.M., not appellant, imported the video into the workplace. Citing Board case law, he asserts that workplace harassment is compensable. Counsel additionally alleges that appellant demonstrated error and abuse by P.D. in failing to promptly address the hostile work environment created by A.M., a contention that OWCP failed to address in its decision.

LEGAL PRECEDENT

Workers' compensation law does not apply 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 concept or coverage of workers' compensation. 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 FECA.[8] 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.[9]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP, 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

[8] *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

[9] *Gregorio E. Conde*, 52 ECAB 410 (2001).

factors of employment and may not be considered.[10] If a claimant does implicate a factor of employment, OWCP 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, OWCP must base its decision on an analysis of the medical evidence.[11]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.[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 FECA, 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 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 under FECA to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[17] The primary reason for requiring factual evidence from the claimant in support of 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 OWCP and the Board.[18]

[10] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[11] *Id.*

[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).

ANALYSIS

Appellant did not attribute her stress and depression to the performance of her regular employment duties under *Cutler*.[19] Instead, she alleged that A.M., a supervisor, sexually harassed her and that P.D., a supervisor, discouraged her from pursuing her complaint of sexual harassment and failed to report her allegation to upper management.

In *Thomas D. McEuen*,[20] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employing establishment and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under FECA would attach if the facts surrounding the administrative or personnel action established error or abuse by employing establishment superiors in dealing with the claimant.

Appellant alleged that P.D. erred in handling her complaint that A.M. sexually harassed her and created a hostile work environment. Complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises discretion fall, as a rule, outside the scope of coverage provided by FECA.[21] This principle recognizes that a supervisor or manager, in general, must be allowed to perform his or her duties and employees will, at times, dislike the actions taken. Mere disagreement or dislike of a supervisory or managerial action will not be compensable, absent evidence of error or abuse.[22] In support of her allegation of error and abuse by the employing establishment, appellant submitted a December 18, 2012 decision by an MSPB judge upholding the employing establishment's reduction of P.D.'s grade and pay beginning August 11, 2012 for failing to perform her supervisory duties. The judge noted that the employing establishment reduced P.D.'s grade, in part, because she failed to report and investigate appellant's disclosure that she felt harassed after A.M. released an inappropriate video. The judge found that the employing establishment had supported its allegation that P.D. violated its procedures by failing to swiftly report the complaint and begin an investigation. The Board finds that appellant has submitted sufficient corroborating evidence to establish error or abuse by Ms. Dempsey in handling her complaint that Mr. Martinez, a supervisor, harassed her and created a hostile work environment.[23]

Appellant additionally contended that J.C., the postmaster, failed to turn off a public address system when she was in her office discussing whether appellant had to supply a vehicle to deliver mail when her vehicle was being repaired. J.C. confirmed that she did not turn off the intercom during their conversation, but asserted that it was accidental. The Board finds that the postmaster's failure to turn off the public address system when she and appellant were discussing

[19] *See Lillian Cutler*, *supra* note 8.

[20] *See Thomas D. McEuen*, *supra* note 12.

[21] *See Judy L. Kahn*, 53 ECAB 321 (2002).

[22] *Id*.

[23] *See generally K.M.*, Docket No. 10-1139 (issued April 25, 2011).

the need for her to use her own vehicle does not rise to the level of error or abuse by management. Instead, it was an oversight by J.C. that did not result in the disclosure of personal information. Appellant has not explained how this oversight by J.C. was significant enough to result in an emotional condition. Consequently, the Board finds that this incident does not constitute a compensable work factor.

Regarding appellant's allegation that she experienced worsening depression after the employing establishment promoted E.O. to management, the Board notes that matters relating to a promotion are not compensable factors of employment absent a showing of error or abuse.[24] Appellant did not submit any evidence showing error or abuse by management in promoting E.O. and thus the Board finds that she has not established a compensable work factor relating to E.O.'s promotion.

Appellant also asserted that a door at her work location had a broken lock. The employing establishment advised that it had repaired a broken interior door lock and noted that there was no lapse of security in building entry or OSHA violation. In a letter dated February 3, 2014, OSHA informed appellant that the hazard was resolved. The Board finds that appellant has not shown error or abuse by the employing establishment in failing to repair a broken door lock.

Primarily, appellant attributed her emotional condition to sexual harassment by A.M. when he distributed a video to coworkers of the two of them engaged in oral sex. Harassment and discrimination by supervisors and coworkers, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.[25] A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.[26]

Appellant and a supervisor, A.M., engaged in a consensual sexual relationship from 2008 to 2011. She maintained that he harassed her in February 2012 by distributing a video of the two of them engaging in sexual activities that was viewed by coworkers. Appellant has submitted sufficient evidence to factually establish her allegation. The employing establishment terminated A.M. for unacceptable conduct after finding that in 2012, while in his position as supervisor, he distributed a video that was viewed by coworkers of appellant and him engaged in a sex act. An MSPB judge also found that appellant established by her testimony, and that of her coworkers, that A.M. released a video of the two of them, engaged in a sex act, to her coworkers. Appellant, consequently, has factually established her allegation that A.M. released a video of a sexual nature to coworkers.

If an altercation or harassment arises out of a personal relationship from appellant's domestic or private life and is imported into the workplace with no contribution or facilitation

[24] *See Charles E. McAndrews*, 55 ECAB 711 (2004) (conditions resulting from the desire for a different job, promotion, or transfer are not compensable).

[25] *T.G.*, 58 ECAB 189 (2006); *Doretha M. Belnavis*, 57 ECAB 311 (2006).

[26] *C.W.*, 58 ECAB 137 (2006); *Robert Breeden*, 57 ECAB 622 (2006).

from employment, the harassment does not arise in the performance of duty.[27] The Board has also held, however, that the fact that the subject of harassment relates to a claimant's personal life rather than her work duties does not remove sexual harassment from coverage under FECA.[28]

In *K.B.*, the claimant and her supervisor had a consensual sexual encounter in 2005.[29] She filed a claim alleging that the supervisor sexually harassed her at work from 2005 to 2008 by coming to her post and discussing their prior sexual encounter, scratching her palm, and commenting on her attractiveness. An investigation by the employing establishment confirmed that the supervisor sexually harassed the claimant from 2005 to 2008. The Board found that the investigation report was probative and established sexual harassment as a compensable work factor.

In this case, MSPB upheld the termination of A.M. by the employing establishment due to charges of unacceptable conduct, including his distribution of the sex video to coworkers. The MSPB decision constitutes probative and reliable evidence supporting her allegation of improper conduct by her supervisor, A.M.[30] The Board, consequently, finds that appellant has established that A.M. sexually harassed her by releasing to coworkers a video of the two of them engaged in a sexual act.

Appellant further alleges that coworkers harassed her by sending her black roses, that E.O. left threatening notes, that a postmaster yelled at her about the threatening notes, and that a manager ordered her to get off Facebook. She has not, however, submitted evidence supporting these allegations and thus has not met her burden of proof to show that they are compensable work factors.[31]

As appellant has established compensable employment factors, the issue is now whether the medical evidence of record supports that she sustained an emotional condition resulting from the compensable employment factors. OWCP found that there were no compensable work factors and thus did not analyze or develop the medical evidence. The case will be remanded to OWCP for this purpose.[32]

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[27] *See L.G.*, Docket No. 08-2481 (issued September 25, 2009) (finding that harassment by a coworker was not compensable when it arose from a personal relationship between appellant and the coworker and employment did not facilitate the situation); *Edward Savage, Jr.*, 46 ECAB 346 (1994) (finding that a dispute concerning a personal debt owed to appellant by a coworker was imported into the workplace and there was no indication that work contributed to or facilitated the dispute, and thus the altercation was not compensable).

[28] *See generally L.B.*, *supra* note 7. In *L.B.*, the Board found that the fact that the subject of the harassing comments concerned the claimant's personal life, rather than her work duties, did not remove the sexually offensive comments from coverage under FECA.

[29] *See K.B. supra* note 6.

[30] *Id*.

[31] *See S.W.*, Docket No. 15-1260 (issued November 4, 2015).

[32] *See Robert Bartlett*, 51 ECAB 664 (2000).

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 12, 2016
Washington, D

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board