

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

K.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Elizabethton, TN, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 15-1535
Issued: September 23, 2016**

Appearances:
*Capp P. Taylor, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 8, 2015 appellant, through counsel, filed a timely appeal of a March 18, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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.*

ISSUE

The issue is whether appellant met her burden of proof to establish an emotional condition in the performance of duty causally related to compensable factors of her federal employment.

FACTUAL HISTORY

On May 10, 2014 appellant, then a 46-year-old sales and service associate, filed an occupational disease claim (Form CA-2) alleging that on May 20, 2013 she first became aware of her stress and depression. However, it was not until April 10, 2014 that she realized her condition was due to her employment. On the back of the claim form, the employing establishment noted that appellant had been sent for an emergency fitness-for-duty evaluation on April 10, 2014, which was her last day of work. It reported that a medical officer recommended that appellant not be permitted to return to work.

In an April 10, 2014 e-mail, Dr. Dyann A. Waugh, an employing establishment physician wrote that, based on a review of an emergency fitness-for-duty evaluation, she recommended that appellant be off work until her medication was adjusted by her treating physicians.

In an April 10, 2014 report, Alice Myers, an advanced practice nurse (APN), noted that appellant related being agitated and stressed out. She reported that the treating physician had given appellant Cymbalta and Oxycodone and recommended that appellant be off work until evaluated by her pain medicine physician. Ms. Myers also noted that appellant had to be cleared by the employing establishment doctor prior to any return to work. Physical examination findings were provided and the conditions of staggering gait, anxiety, fibromyalgia, and Sjörger-Larsson syndrome were noted.

In a May 14, 2014 note, Marcus Webb, a nurse practitioner, reported that appellant was under his care for anxiety and depression. He opined that due to appellant's mental and medical condition that she was unable to continue with her current employment. Mr. Webb, in a report dated May 14, 2014, noted that appellant was under his care and was currently disabled from work due to her depression and anxiety.

By letter dated May 27, 2014, OWCP informed appellant that the evidence of record was insufficient to establish her emotional condition claim. Appellant was advised as to the medical and factual evidence required and given 30 days to provide this information.

In a separate letter dated May 27, 2014, OWCP requested that the employing establishment comment on appellant's statements relative to the claim. No response was received from either party within the time allotted.

By decision dated July 1, 2014, OWCP denied appellant's claim as she had failed to establish fact of injury. It found that she failed to provide any statement detailing the work factors she believed caused or contributed to her emotional condition.

On July 7, 2014 counsel requested a telephonic hearing before an OWCP hearing representative, which was held on January 26, 2015. At the beginning of the hearing, he noted

that appellant had filed an Equal Employment Opportunity (EEO) claim for alleged sexual harassment, which did not go far. Appellant testified that prior to the harassment, that she had no psychiatric problems. She explained that she had been sexually harassed by subordinate employee M.B. while she was postmaster at the Roan Mountain Post Office. Appellant testified that the sexual harassment continued for two years and consisted of inappropriate touching and texting. She claimed that she had received text messages from M.B. which noted his name, date of text, and that the texts were sent to her. Appellant further testified that M.B. sent her inappropriate letters which she destroyed because she did not want her husband to see them. Summaries of text messages were provided, which appellant alleged M.B. had sent her on various dates in March and April 2013.

Appellant went on to testify that M.B. tried to physically touch her inappropriately. Due to this conduct, she became stressed, depressed, unable to sleep, and had low self-esteem. Appellant also stated that she felt demoralized and avoided going to work so she would not have to face M.B. Her work attendance, productivity and job satisfaction was also impacted by this unwanted touching and texting. Appellant related that, to avoid M.B., she would arrive after lunch and that she lost a lot of time at work by trying to avoid any incidents or meetings with M.B. She stated that she submitted a statement regarding the sexual harassment on June 18, 2013, that she met with two other postmasters and described to them what she had experienced, and that she also had a meeting with the postal inspector about her allegations, and provided the postmasters and the postal inspector with copies of the text messages. Appellant added that the aforementioned individuals asked her if she would be willing to take a polygraph test and that she replied affirmatively. Further, appellant testified that although she did not file any police complaint against M.B., she reiterated that she presented this matter to the "U.S. Postal Inspection Service," members of which interviewed her. She noted that after the interview, she "[n]ever heard anything else from them."

According to appellant, M.B. was transferred to a different location closer to his home, which was the only discipline issued against him. Next, appellant testified that the employing establishment removed her from her postmaster position in September 2013 due to her absences. She also alleged that she was harassed by her boss after she filed her sexual harassment claim, and then downgraded to a sales service position in February 2014. She testified that the employing establishment contended that she was downgraded from postmaster allegedly because of an attendance issue and not in retaliation for filing a sexual harassment claim. Appellant also related that May 2014 was the last time she worked for the employing establishment.

On February 9, 2014 OWCP informed appellant that a copy of the transcript had been provided to the employing establishment, which had 20 calendar days to respond. No response from the employing establishment was received.

Subsequent to the hearing counsel submitted medical and factual evidence including a June 18, 2013 statement that he identified as being from appellant, and a printout of the text messages that she referred to during her hearing testimony.

Appellant submitted a June 18, 2013 statement alleging at least two years of sexual harassment by M.B. She alleged that his behavior was offensive and unwelcome, but that she decided against hiring a replacement clerk as she believed it would take too long. As a result of

the sexual harassment appellant experienced low self-esteem, excess stress, depression, and loss of sleep as well as having her physical and emotional well being adversely impacted. Appellant noted that due to her fibromyalgia and lupus she missed a lot of time from work, but that she mainly was trying to avoid M.B. She reported that she would come to work after lunch to avoid M.B. as he would stay late in the mornings. On December 1, 2012 appellant alleged that M.B. demanded that her parents have her admitted to an emergency room. Regarding letters and text messages that she received from M.B., appellant stated, "I wasn't thinking and deleted and threw lots away." Next she described the text messages she received from M.B. on March 20, April 6, 25, and 26, 2013 that she had retained, detailing how he cared about her and was concerned about her.

The record contains a printout from a Sprint text messaging account which noted the same first name as M.B.'s, as the contact. The messages were dated from March 18 to May 1, 2013. The record shows that on March 18, 2013 there were text messages from a person with the same first name as M.B.'s discussing Baptist and Catholic men, his feelings, inquires about appellant's well-being, salacious comments, and drug use references. The last two text messages concerned the textee's problems, rumors, questions about what the textee wanted him to do, that they were "just tired of all the 'drama,' and that the [employing establishment will not] put up with it much more."

Tedd A. Stephens, Ed.D., a treating psychologist, noted in a February 10, 2015 report that appellant was first referred by the employing establishment employee assistant program for psychological services in 2013. He reported various stressors including family health concerns, health problems, aftermath of being sexually harassed both on and off the job by a male employee appellant supervised, suspension from being a postmaster, administrative leave for months, and economic hardshipship. Mr. Stephens diagnosed depression and anxiety, which he attributed to medical problems with the symptoms being magnified by the added life distress. He observed that the sexual harassment and lack of concern/respect shown by her supervisors did damage to her self-esteem.

By decision dated March 18, 2015, OWCP's hearing representative affirmed the denial of appellant's claim. He found that appellant failed to establish any compensable factors of employment.

LEGAL PRECEDENT

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

³ V.W., 58 ECAB 428 (2007); 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.⁴ 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.⁵ Where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁶ 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.⁷

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 factors of employment and may not be considered.⁸ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.⁹ 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.¹⁰

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.¹¹ 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.¹² 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.¹³

⁴ *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

⁵ *A.K.*, 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005).

⁶ 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁷ *J.F.*, 59 ECAB 331 (2008); *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁸ *D.L.*, 58 ECAB 217 (2006); *Jerald R. Gray*, 57 ECAB 611 (2006).

⁹ *K.W.*, 59 ECAB 271 (2007); *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

¹⁰ *Robert Breeden*, *supra* note 5.

¹¹ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹² See *William H. Fortner*, 49 ECAB 324 (1998).

¹³ *Ruth S. Johnson*, 46 ECAB 237 (1994).

The Board has held that the manner in which a supervisor exercises her discretion falls outside the coverage of FECA. This principal recognizes that a supervisor or manager must be allowed to perform their duties and that employee's will, at times, disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.¹⁴ Although the handling of leave requests and attendance matters are generally related to employment, they are administrative matters and not a duty of the employee.¹⁵

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur.¹⁶ Mere perceptions of harassment or discrimination are not compensable under FECA.¹⁷ A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹⁸ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁹ A claimant must establish a factual basis for his or her allegations of harassment or discrimination with probative and reliable evidence.²⁰

ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of sexual harassment, a demotion from her role as postmaster, and her suspension from work. OWCP denied her emotional condition claim, as she failed to establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA.

The Board finds that appellant's allegations do not pertain to her regular or specially assigned duties under *Cutler*.²¹

Regarding her allegations that she was improperly demoted from her postmaster position and suspended from work, appellant's allegations pertain to administrative and personnel actions. In *Thomas D. McEuen*,²² the Board held that an employee's emotional reaction to

¹⁴ *S.M.*, Docket No. 09-2290 (issued July 12, 2010); *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

¹⁵ *C.T.*, Docket No. 08-2160 (issued May 7, 2009); *Jerald R. Gray*, *supra* note 8.

¹⁶ *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, *supra* note 4.

¹⁷ *M.D.*, 59 ECAB 211 (2007).

¹⁸ *J.F.*, 59 ECAB 331 (2008); *Robert Breeden*, *supra* note 4.

¹⁹ *G.S.*, Docket No. 09-764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005); *Penelope C. Owens*, 54 ECAB 684 (2003).

²⁰ *Robert Breeden*; *supra* note 4; *Beverly R. Jones*, 55 ECAB 411 (2004).

²¹ *See Cutler supra* note 6.

²² *Thomas D. McEuen*, *supra* note 11.

administrative actions or personnel matters taken by management is not generally covered under FECA as such matters pertain to procedures and requirements of the employer 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 factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²³ In the present case, appellant has not submitted any evidence to establish that the employing establishment acted unreasonably in these personnel matters.

Appellant's primary claim is that M.B., a subordinate, subjected her to sexual harassment and unwanted physical touching, which caused her emotional condition. Appellant testified at the hearing that she reported M.B.'s sexual harassment and unwanted affections to two other postmasters and a postal inspector, and provided them with a June 18, 2013 statement describing incidents where M.B. harassed her and how demoralizing she felt as a result. She noted that she had submitted the aforementioned statement to the "U.S. Postal Inspection" unit, along with a printout of a series of text messages from M.B., which she had extracted from her text messaging account. With regard to the text messages from M.B., they address salacious comments, his feelings toward her, discussions on Baptist and Catholic men, inquiries regarding her health, and drug use references. Appellant noted that, although she provided the foregoing information to the employing establishment and expressed her willingness to undergo a polygraph test, she "[n]ever heard anything else from them." The Board notes that prior to and subsequent to the hearing, OWCP had allotted time for the employing establishment to respond to appellant's allegations. However, no response was received. Nevertheless, OWCP found that appellant had not established any compensable factors of employment.

OWCP procedures state:

"If an employing [establishment] fails to respond to a request for comments on the claimant's allegations, the [claims examiner] may usually accept the claimant's statements as factual. However, acceptance of the claimant's statements as factual is not automatic in the absence of a reply from the [employing establishment], especially in instances where performance of duty is questionable. The Board has consistently held that allegations unsupported by probative evidence are not established. *James E. Norris*, 52 ECAB 93 (1999); *Michael Ewanichak*, 48 ECAB 364 (1997). The [claims examiner] should consider the totality of the evidence and evaluate any inconsistencies prior to making a determination."²⁴

²³ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

²⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.5(d)(1) (June 2011).

Based on appellant's hearing testimony that she interviewed with two postmasters and a postal inspector from the employing establishment, submitted the printout of the text messages, and submitted the June 18, 2013 statement recounting M.B.'s behavior, it appears to this Board that the employing establishment conducted an investigation into appellant's allegations. Appellant testified that once she presented the evidence and interviewed with the various employing establishment officials, she did not hear anything further from them. The Board finds that it is unable to make an informed decision in this case as the employing establishment did not respond to the requests for comment made by OWCP in the May 27, 2014 development letter and during the hearing.

Although it is a claimant's burden to establish his or her claim, OWCP is not a disinterested arbiter but, rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.²⁵ Since appellant's allegations indicate that the employing establishment would have in its possession evidence relevant to appellant's sexual harassment allegations, (*i.e.*, findings of the Postal Inspection Service's investigation) OWCP should obtain a response from the employing establishment to the allegations of sexual harassment and unwanted physical touching and any relevant evidence or argument.²⁶

This issue of the case will, accordingly, be remanded to OWCP for further development of the evidence regarding appellant's allegations of sexual harassment. It shall request that the employing establishment provide a detailed statement and relevant evidence and/or argument regarding appellant's allegations. Following this and any necessary further development, OWCP shall issue a *de novo* decision regarding whether appellant has established any compensable factors of employment regarding sexual harassment or unwanted touching.

CONCLUSION

The Board finds that appellant has not established any compensable factors of employment relative to administrative or personnel matters, such as her demotion and suspension from work. The Board further finds that the case is not in posture for decision regarding whether appellant has established a compensable factor of employment as to allegations of sexual

²⁵ See *e.g.*, *L.L.*, Docket No. 12-194 (issued June 5, 2012) (where the Board remanded the case for OWCP to ascertain whether the parking lot where the incident occurred was considered the employing establishment's premises. The Board noted that this information was not of the type readily available to appellant). See also *P.S.*, Docket No. 15-1672 (issued December 7, 2015) (where the Board remanded the case for OWCP to sufficiently develop the evidence regarding whether appellant was in the performance of duty at the time of the alleged motor vehicle accident. The Board noted that a statement from the employing establishment was essential in developing the performance of duty claim).

²⁶ See 20 C.F.R. § 10.117(a), which provides, "An employer who has reason to disagree with any aspect of the claimant's report shall submit a statement to OWCP that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support its position. The employer may include supporting documents such as witness statements, medical reports or records, or any other relevant information."

harassment, including unwanted touching. The case is remanded for further evidentiary development.²⁷

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 18, 2015 is affirmed in part and remanded in part for further action consistent with this decision of the Board.

Issued: September 23, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²⁷ As appellant has not established a compensable employment factor, the Board need not consider the medical evidence of record at this time. See *Katherine A. Berg*, 54 ECAB 262 (2002).