United States Department of Labor
Employees' Compensation Appeals Board

RHONDA F. SCHMIDT, Appellant	)	
and	)	**Docket No. 05-607**
	)	**Issued: September 23, 2005**
U.S. POSTAL SERVICE, CHEYENNE P & DC, Cheyenne, WY, Employer	)	

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 14, 2005 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated November 30, 2004, which denied her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty for the period January 16, 2001 to February 11, 2002 causally related to factors of her federal employment.

FACTUAL HISTORY

On March 11, 2002 appellant, then a 45-year-old directory analysis specialist,[1] filed an occupational disease claim, alleging that she was subjected to harassment and abuse at work

[1] The record indicates that this is a management position.

which caused depression, anxiety and post-traumatic stress disorder. She was first aware of the condition and its relationship to her employment on November 23, 2000 and February 8, 2002. Appellant stopped worked on February 11, 2002. On April 5, 2002 the employing establishment controverted the claim and noted that appellant had filed a previous stress claim in November 2000, Office file number 120195504, that was denied.

By letter dated April 16, 2002, the Office informed appellant of the evidence needed to support her claim, and she was given 30 days to respond. In a May 29, 2002 decision, the Office found that appellant did not establish that she sustained an employment-related injury, noting that she did not respond to the April 16, 2002 letter. On June 25, 2002 appellant requested a hearing.

At the hearing, held on December 20, 2002, appellant testified that she did not work for 45 days in 2000 due to stress and returned to work on January 16, 2001. The hearing representative advised her that incidents prior to that time would be adjudicated under her prior claim and the instant claim was in regard to work incidents that occurred after her return to work in January 2001 until she stopped in February 2002. Appellant testified that, after her return to work, her hours were permanently changed from 7:00 a.m. to 2:00 p.m. to the 2:00 p.m. to 11:00 p.m. shift, and that she could not maintain her level of excellence in her job in the newly assigned tour. Appellant felt isolated because responsibilities were taken away from her and she was no longer involved in projects, noting that she could not attend meetings because of the schedule change. She alleged that Robert Hruby, plant manager, and Robert Gross, her immediate supervisor, would not talk with her and treated her in a hostile and derogatory manner. Appellant received a letter of warning in October 2001 for inappropriate conduct in a meeting, and was scheduled to attend a training seminar; however, it was cancelled, noting that at the time her husband was being treated for cancer. She noted, however, that she was allowed to attend the training. Appellant's mother, Dorothy Sims, attended the hearing and provided comments regarding her allegations.

At the hearing, appellant submitted a statement dated December 18, 2002 in which her sister, Dixie M. Roberts, Mr. Hruby's former wife, advised that appellant described incidents that occurred at work. She noted a change in appellant's demeanor over the past several years, alleging that this was due to the treatment of Mr. Hruby and Mr. Gross. In a December 19, 2002 statement, Donald R. Wells, a coworker, stated that he witnessed Mr. Hruby verbally attack appellant and give her extra work. In an undated statement, Ms. Sims related her observations of events appellant reported to her.

In February 15 and March 25, 2002 reports, Dr. Angelina Montoya, a Board-certified psychiatrist, stated that she began treating appellant in January 2001 and advised that she needed medical leave due to severe major depression, post-traumatic stress disorder and a generalized anxiety disorder. Appellant also submitted a number of reports from Dr. Marita J. Keeling, an attending Board-certified psychiatrist, who, in a December 15, 2002 report, stated that she began treating appellant on March 26, 2002. She noted appellant's report of work incidents in 1997 and 1998 and that she took medical leave in November 2000 due to stress. Dr. Keeling stated that, after appellant returned to work on January 16, 2001, Mr. Hruby and Mr. Gross began to harass her, addressing the shift change, and that appellant became fearful of losing her job. She diagnosed major depressive episode and post-traumatic stress disorder, opining that these were

"directly related to and caused by a series of incidents at work ... which appear to reflect a pattern of hostile and retaliatory behavior purposefully directed at [appellant]." She also submitted treatment notes dated May 21 and June 12, 2002 from licensed social workers, Barbara B. Dolby and Steffey Swain.

Appellant submitted several statements in which she reiterated her allegations, noting that she was unable to do her job properly due to the schedule change. She described that she could not run timely updates and weekly refresh procedures and that she was unable to provide requested help to other postal facilities. Appellant reiterated that she was harassed by Mr. Gross and Mr. Hruby, commenting that the schedule change was a form of retaliation. She alleged that her job responsibilities were changed, that her telephone was not in her office when she returned to work in January 2001 and that her badge was suspended while she was not working from November 2000 to January 2001. Appellant also submitted her comments on the hearing transcript and copies of emails and memoranda which detailed events at the employing establishment between January 16, 2001 to February 11, 2002 and regarding Equal Employment Opportunity (EEO) Commission claims she had filed. A settlement agreement was signed on March 27, 2001 which indicated that, for a trial of 90 days, appellant's schedule was to be changed to noon to 9:00 p.m. on Monday and 10:00 a.m. to 7:00 p.m. Tuesday through Friday. Weekly meetings were to be held, and Mr. Gross was to meet with appellant "to set priorities, discuss workload and communication issues." Appellant agreed to withdraw her EEO complaint.

A November 15, 2001 letter of warning cited appellant for unacceptable conduct at a meeting on October 25, 2001. In statements from coworkers dated October 29, 2001, Michael S. Moyer opined that appellant became upset at the meeting and her participation was "somewhat unprofessional." Julie Tipsword and Jeff Dockter described the meeting and noted that appellant became upset. A January 18, 2002 settlement agreement regarding the letter of warning indicated that it would remain in appellant's office personnel file for one year. In a December 11, 2001 email, Mr. Hruby stated that appellant had been rude and inconsiderate at a dinner. Appellant appended a note to the email, stating that she thought comments at the annual Christmas dinner were directed at her and that she left before dinner was served. In a December 19, 2001 email, Ms. Tipsword, acting manager, noted that appellant had been given an official discussion for failure to follow the proper protocol in notifying her supervisor regarding her absence from work.

The employing establishment submitted a response dated January 23, 2003 which noted that three employee's shifts were changed in November 2000 and that a notice had been given to appellant on November 17, 2000.[2] The employing establishment stated that some of appellant's previous duties were transferred to other employees after the schedule change, that the letter of warning was for unacceptable conduct, that the official discussion was because appellant did not follow proper procedures and that, while her attendance at the training session was initially cancelled, it was because her husband was undergoing treatment for cancer and she did not know what her schedule would be. The employing establishment noted that Mr. Wells had retired in

[2] In November 2000 appellant first stopped work and filed a stress claim which was denied by the Office under file number 120195504.

1998 and attached documentation, including a November 17, 2000 email which indicated that the schedules of Mr. Gross, Ms. Tipsword and appellant were changed at that time.

In a February 10, 2003 letter, appellant reiterated her contentions, again alleging that the schedule change was retaliation and that she could not do her job properly. She included additional documentation, including a letter dated December 20, 2002, in which the EEO indicated that her complaint had been accepted for investigation.

By decision dated March 13, 2003, the hearing representative affirmed the May 29, 2002 decision. On July 31, 2003 appellant, through her attorney, requested reconsideration and an unsigned statement from an unnamed supervisor of distribution operations at the Cheyenne facility dated July 18, 2001 who noted that appellant's schedule change in January 2001 affected mail sorting operations and that she was "targeted" by Mr. Gross and Mr. Hruby. In a June 9, 2003 statement, Ron Mobley, a postmaster, noted some problems and requests for help from the Cheyenne facility. In a June 15, 2003 statement, Bill Carstens, supervisor of customer service, opined that appellant should be able to work days so that she could load schemes while the machines were not running, could support the field offices, and would have access to the people who supported her. In a July 17, 2003 statement, David Mayzes, an operations support specialist in Denver, reported that he had worked appellant's position from 1988 to 1991 and provided his opinion on how the position should be handled. Sheila Miller, a coworker, provided a July 17, 2003 statement, opining that appellant's job change and the removal of job responsibilities crippled her ability to be successful in her job. She noted appellant's badge was suspended while she was out on sick leave in December 2000, that Mr. Gross would use a different tone of voice with appellant, stated her feeling that Mr. Gross was "pitting" appellant against Ms. Tipsword, and that Mr. Gross and Mr. Hruby continually undermined appellant.

By decision dated December 17, 2003, the Office denied appellant's reconsideration request on the grounds that no new argument was submitted and the evidence submitted was vague and lacked specificity. On May 24, 2004 appellant, through her attorney, requested reconsideration and submitted a statement dated May 20, 2004 in which she reiterated her allegations.

Mr. Gross submitted a statement in response which countered appellant's allegations. He noted that several schedule changes had been made in November 2000, that appellant's schedule was modified in March 2001 and that she was not blamed for any problems she encountered with her work. She received an outstanding performance evaluation and cash award for fiscal year 2001. He stated that requests for help from other postal facilities should have been forwarded to the Denver office, and noted that some problems occurred throughout the state. The employing establishment also submitted an October 19, 2004 statement from its injury compensation specialist who disagreed with appellant's allegations.

In a November 30, 2004 decision, the Office denied modification of the prior decisions. Appellant did not establish a compensable factor of employment and her injury did not occur in the performance of duty.[3]

LEGAL PRECEDENT

To establish her claim that she sustained an emotional condition in the performance of duty, appellant 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.[4]

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*,[5] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[6] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[7] 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 an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[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]

As a general rule, an employee's emotional reaction to administrative or personnel actions taken by the employing establishment is not covered because such matters pertain to procedures and requirements of the employer and are not directly related to the work required of

[3] On December 30, 2004 appellant's attorney requested a hearing. Appellant filed her appeal with the Board on February 14, 2005. It is well established that the Board and the Office may not have concurrent jurisdiction over the same issue in the same case and following the docketing of an appeal with the Board, the Office does not retain jurisdiction to render a further decision regarding the case on appeal until after the Board relinquishes its jurisdiction. *See Jacqueline S. Harris*, 54 ECAB ____ (Docket No. 02-203, issued October 4, 2002; *Cathy B. Millin*, 51 ECAB 331 (2000); *Douglas E. Billings*, 41 ECAB 880 (1990).

[4] *Leslie C. Moore*, 52 ECAB 132 (2000).

[5] 28 ECAB 125 (1976).

[6] 5 U.S.C. §§ 8101-8193.

[7] *See Robert W. Johns*, 51 ECAB 137 (1999).

[8] *Lillian Cutler*, *supra* note 5.

[9] *Kim Nguyen*, 53 ECAB 127 (2001).

the employee.[10] An administrative or personnel matter will be considered to be an employment factor, however, where the evidence discloses error or abuse on the part of the employing establishment.[11]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[12]

ANALYSIS

Appellant alleged a number of employment conditions which she believed caused her stress-related conditions and that she was harassed by Mr. Gross and Mr. Hruby. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.[13] The Board however finds that appellant has failed to establish that these were compensable factors of employment.

An employee's frustration over not being permitted to work a particular shift or to hold a particular position is not covered under the Act.[14] Changes in workdays and hours, positions, locations and changes in an employee's duty shift may constitute a compensable factor of employment arising in the performance of duty. The factual circumstances surrounding the claim must be carefully examined to discern whether the alleged injury is being attributed to the inability to work regular or specially assigned job duties due to a change in duty shift, *i.e.*, a compensable factor arising out of and in the course of employment, or whether it is based on a claim that is premised on frustration over not being permitted to work a particular shift or to hold a particular position. The assignment of a work schedule or tour of duty is recognized as an administrative function of the employing establishment and, absent any error or abuse, does not constitute a compensable employment factor.[15]

The Board finds in this case that appellant's schedule change and change in work assignments are not compensable. Such a change in assignments and the reaction to the change was a frustration in not holding a particular position or being permitted to work in a particular environment.[16] Appellant alleged that certain work duties were taken away from her. Her desire

[10] *Felix Flecha*, 52 ECAB 268 (2001).

[11] *James E. Norris*, 52 ECAB 93 (2000).

[12] *Id.*

[13] *Katherine A. Berg*, 54 ECAB ____ (Docket No. 02-2096, issued December 23, 2002).

[14] *Kim Nguyen*, *supra* note 9.

[15] *Penelope C. Owens*, 54 ECAB ____ (Docket No. 03-1078, issued July 7, 2003).

[16] *Katherine A. Berg, supra* note 13.

for a different shift constitutes frustration at not being allowed to work the job duties or hours she preferred. An employee's complaints concerning the manner in which a supervisor performs his or her duties as a supervisor or the manner in which a supervisor exercises his or her supervisory discretion fall, as a rule, outside the scope of coverage of the Act. This principle recognizes that a supervisor or manager, in general, must be allowed to perform their duties and that employees will at times dislike the actions taken.[17] Furthermore, the Board has held that mere disagreement or dislike of a supervisory or management action will not be compensable without a showing through supporting evidence that the incidents or actions complained of were unreasonable.[18] In this case, the Board finds that it was reasonable for the employing establishment to change appellant's schedule, along with two other employees, in November 2000 and modify it in March 2001. While appellant submitted several statements indicating that it might have been better to have retained her at her previous work tour, these statements do not provide probative evidence that her schedule change was an improper supervisory function. The Board finds that the statements from Mr. Carstens and managers at other facilities do not establish error or abuse regarding the management decision to change appellant's schedule. Dissatisfaction with the type of work assigned, or desire to perform different duties, does not come within coverage of the Act.[19] Any reaction appellant had was frustration from not being permitted to work in a particular environment or hold a particular position,[20] and she did not establish that the employing establishment erred in regard to this administrative matter and any reaction must be considered self-generated.[21]

Although the assignment of training, the handling of disciplinary actions, the assignment of work duties and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer rather than regular or specially assigned work duties of the employee.[22] Appellant took issue with the fact that a training trip scheduled for December 2001 was initially cancelled. The record, however, indicates that, at the time of the scheduled training as her husband had been diagnosed with cancer and was undergoing treatment, she was unsure of her schedule. It was therefore reasonable for the employing establishment to select an alternate to go in her place, and in the end appellant attended the training session.

Appellant also alleged that it was improper for Mr. Hruby to send her an email regarding her conduct at an employing establishment Christmas party at a restaurant. The Board has recognized the compensability of verbal abuse in certain circumstances. This, however, does not imply that every statement uttered in the workplace will give rise to compensability.[23] The

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

[18] *Id.*

[19] *Katherine A. Berg, supra* note 13.

[20] *See Kim Nguyen, supra* note 9.

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

[22] *James E. Norris, supra* note 11.

[23] *Denise Y. McCollum*, 53 ECAB 647 (2002).

Board finds that the fact that Mr. Hruby expressed his opinion regarding appellant's behavior at a dinner does not constitute a compensable factor. As appellant did not show how this opinion would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.[24]

The record contains an EEO settlement agreement dated March 27, 2001 between appellant and the employing establishment, represented by Mr. Gross, which indicates that both parties agreed to communicate better and her schedule was modified. The mere fact that appellant's schedule was modified does not, in and of itself, establish error or abuse by management in its administrative functions.[25]

Appellant also indicated that an EEO complaint had been filed in 2002. In assessing the evidence, the Board has held that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[26] Appellant submitted no evidence regarding the complaint, and there is nothing specific in the record to substantiate that the employing establishment was not in compliance with the March 2001 EEO agreement. She therefore failed to establish a compensable factor of employment in this regard.

Regarding the letter of warning and other disciplinary matters, absent a showing of error or abuse, disciplinary matters generally fall outside the scope of coverage under the Act.[27] Although the handling of leave requests and attendance matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee, and absent error or abuse are not compensable employment factors.[28] In this case, there is nothing of record to indicate that the employing establishment erred in these disciplinary matters. The employing establishment provided ample explanations regarding these disciplinary matters and, in fact, appellant received an outstanding performance appraisal for fiscal year 2001.

Appellant also contended that she was harassed by Mr. Gross and Mr. Hruby, specifically noting that the schedule change was in retaliation and that she felt isolated, could not attend meetings and was generally spoken to and treated in a derogatory manner. She also stated that the fact that her telephone was not in her office when she returned to work in January 2001 and that her security badge was suspended during her absence were examples of harassment.

With regard to emotional claims arising under the Act, the term "harassment" as applied by the Board is not the equivalent of "harassment" as defined or implemented by other agencies, such as the EEO Commission, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under the Act, the term "harassment" is synonymous, as generally defined, with a persistent

[24] *See Peter D. Butt, Jr.*, 56 ECAB ___ (Docket No. 04-1255, issued October 13, 2004).

[25] *Id.*

[26] *Michael L. Deas*, 53 ECAB 208 (2001).

[27] *Bobbie D. Daly*, 53 ECAB 691 (2002).

[28] *Judy L. Kahn, supra* note 17.

disturbance, torment or persecution, *i.e.*, mistreatment by co-employees or workers. Mere perceptions and feelings of harassment will not support an award of compensation.[29]

A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.[30] While appellant submitted a number of statements, the Board finds the December 19, 2002 statement from Mr. Wells of no diminished probative value as he had retired from the employing establishment in 1998, which predates the period of alleged discrimination in this case and provides no specifics pertaining to the alleged incidents described by appellant.[31] Likewise, the statements by appellant's mother and sister are of limited relevance as they did not witness any alleged workplace abuse. The statements by coworkers that opine that appellant was treated in an unfair way by Mr. Gross and Mr. Hruby are also of limited probative value as they are general in nature and do not provide specific descriptions of incidents or dates upon which these alleged incidents occurred. These statements are not probative in establishing any instances alleged by appellant and are insufficient to establish that the employing establishment harassed or discriminated against her.[32]

Mere perceptions of harassment or discrimination are not compensable under the Act,[33] and unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.[34] In the case at hand, the Board finds that appellant's allegations do not rise to a level to establish harassment, rather they constitute her perception and are therefore insufficient to establish her claim for an employment-related emotional condition.[35] The Board therefore finds that appellant has not established as factual a basis for her perceptions of discrimination or harassment by the employing establishment for the period January 16, 2001 to February 11, 2002 as she provided insufficient probative evidence to establish that harassment and/or discrimination occurred.[36] The Board therefore concludes that appellant did not establish a compensable employment factor with respect to harassment and discrimination.[37] The evidence instead suggests that appellant's feelings were self-generated and thus not compensable under the Act.[38]

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[29] *Beverly R. Jones*, 55 ECAB ____ (Docket No. 03-1210, issued March 26, 2004).

[30] *Penelope C. Owens*, *supra* note 15.

[31] *See James E. Norris*, *supra* note 11.

[32] *See Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004).

[33] *Beverly R. Jones*, *supra* note 29.

[34] *James E. Norris*, *supra* note 11.

[35] *See Barbara J. Latham*, 53 ECAB 316 (2002).

[36] *James E. Norris*, *supra* note 11.

[37] *See Jamel A. White*, 54 ECAB ____ (Docket No. 02-1559, issued December 10, 2002).

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

Inasmuch as appellant failed to implicate a compensable employment factor, the Office properly denied her claim without addressing the medical evidence of record.[39]

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to factors of her employment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 30, 2004 be affirmed.

Issued: September 23, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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

[39] *Garry M. Carlo*, 47 ECAB 299 (1996).