

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

DIANE SMITH, Appellant)
)
and) **Docket No. 05-1204**
) **Issued: September 13, 2005**
U.S. POSTAL SERVICE, BULK MAIL)
CENTER, Cincinnati, OH, Employer)

)

Appearances:
Diane Smith, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 9, 2005 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated April 28, 2005, 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 causally related to factors of her federal employment.

FACTUAL HISTORY

On July 17, 2001 appellant, then a 47-year-old vehicle operations assistant, filed an occupational disease claim alleging that working in a hostile environment caused stress.

She realized her condition was employment related on June 18, 2001.¹ In an attached statement, appellant advised that she could not sleep, had crying spells, irritability, shakes, headaches and fear and alleged that management let a specific coworker create a hostile environment. She stated that, when she complained about the conditions, her supervisor stated that he was told to fire her. She submitted treatment notes dated June 21 and 28, 2001 from Dr. Nancy Elder, Board-certified in family medicine, who reported a history of stress at work and diagnosed probable anxiety and stress, questionable depression. She advised that appellant needed a “mental health break” from work.

By letters dated August 6, 2001, the Office informed appellant of the evidence needed to develop her claim and asked that the employing establishment respond to appellant’s allegations.

In a statement dated June 21, 2000, appellant reported that a coworker, Joyce Boze, aggravated her and was allowed to do as she pleased. She reported an incident that occurred on June 28, 2001 involving scheduling lunch breaks, asserting that Ms. Boze was allowed to run the unit. On July 20, 2001 her supervisor, Darryl Miller, asked her to accompany him to Chris Lohmann’s office for a discussion regarding her workers’ compensation claim. She requested a transfer at that time. The record contains transfer requests dated August 2 and 7, 2001.

In an August 21, 2001 statement, appellant described her problems with Ms. Boze, which dated back to 1997 and occurred on a daily basis. She stated that they did not get along, noting that Ms. Boze spoke to her in a hostile tone, made snide remarks and would not speak to her at times. On one occasion Ms. Boze snatched a computer monitor away from her and got appellant into trouble regarding her private telephone use. She alleged that there was general confusion in the office, which was not always directed at her, and that, when she discussed these problems with her supervisor and management, they were unsympathetic. She alleged that her supervisor, Mr. Miller, was not trained to handle the situation. She also stated that the union would not help her file grievances and reiterated that she had requested a transfer.

Appellant submitted treatment notes dating from January 20 to March 4, 1998 and additional reports from Dr. Elder, including an August 17, 2001 report in which she diagnosed depression and generalized anxiety disorder, outlined her treatment and advised that appellant’s work situation exacerbated the problem. In a July 31, 2001 report, Kathleen Laba, M.A., noted that she had counseled appellant on July 12 and 31, 2001. Elizabeth Leslie-Leshner, M.S.W., submitted an August 30, 2001 report in which she noted appellant’s report of difficulties at work and that she began counseling with her on July 30, 2001.

On August 24, 2001 the employing establishment controverted the claim. In a September 5, 2001 letter, Mr. Lohmann, acting transportation manager, countered appellant’s

¹ Appellant had three prior appeals to the Board. In a March 23, 1993 order, Docket No. 93-516, the Board dismissed the case to enable appellant to request reconsideration and submit new evidence to the Office. In a January 6, 1997 decision, Docket No. 95-48, the Board found that the Office did not abuse its discretion by denying to reopen the case for merit review. By decision dated May 23, 1997, the Board found that a February 12, 1994 incident occurred in the performance of duty and remanded the case to the Office to develop the medical record to determine if appellant established that she sustained an emotional condition causally related to the accepted employment factor.

allegations, noting that she had previously filed a stress claim which was not accepted. He stated that, shortly after his arrival at the employing establishment in March 2001, he received a telephone call from appellant regarding her perceived unfair treatment concerning the approval of requested leave. Mr. Lohmann stated that he analyzed her leave requests and those of other same shift employees and found no disparate treatment, noting that appellant had ample leave requests approved. Appellant spoke with him about the perceived hostile work environment in June 2001, after which he spoke with her supervisor, Mr. Miller, who afterwards spoke with both appellant and Ms. Boze privately. Mr. Lohmann concluded that the allegations made by appellant had not been substantiated. He also submitted appellant's job description and a lunch schedule posted by Mr. Miller, which indicated that lunches and breaks would rotate by seniority.

In an August 29, 2001 letter, L. Saylor, a union steward, advised that beginning in 1999 appellant had a problem with a coworker that was not considered contractual so a grievance filed by appellant was withdrawn. He was advised by his craft director that a problem between two workers was between them and management or with the Equal Employment Opportunity Commission.

By decision dated March 29, 2002, the Office denied the claim, finding that appellant failed to establish a compensable factor of employment. On April 23, 2002 she requested a hearing, that was held on February 25, 2003.

At the hearing, appellant and a coworker, Mary Melissa Pullgeers, testified regarding Ms. Boze's behavior at the employing establishment, which appellant characterized as torment and verbal abuse including cursing and inappropriate comments. She alleged that Ms. Boze would slam drawers and doors and that she felt threatened by Ms. Boze. Appellant noted that Ms. Boze was friends with her supervisor, Mr. Miller, and alleged that she came to work drunk. She stated that her confrontations with Ms. Boze began in 1997 regarding scheduling breaks and began again in 1999. She alleged that Ms. Boze had everyone, including management, intimidated and testified that she changed her work hours in 2001, because of Ms. Boze and was therefore no longer exposed to her behavior. Ms. Pullgeers, who at the time of the hearing worked with Ms. Boze, testified regarding her personal encounters and stated that Ms. Boze had recently received a letter of warning.

At the hearing, appellant submitted statements dated December 14, 2002 to February 11, 2003 from Sherry McCoy, a coworker. She described her personal problems with Ms. Boze and noted encounters between Ms. Boze and Steve Dingler. In an undated statement, Sandra Smock indicated that she worked in the vehicle office from July 2001 to June 2002 and alleged that a hostile work environment existed there, describing encounters between Ms. Boze and Mr. Dingler.

By decision dated June 13, 2003, an Office hearing representative affirmed the March 29, 2002 decision. On May 19, 2004 appellant requested reconsideration, reiterating her contention that a hostile work environment caused her emotional condition. In a decision dated April 28, 2005, the Office reviewed the merits of the claim and denied modification of the June 13, 2003 decision.

LEGAL PRECEDENT

To establish a claim of an emotional condition in the performance of duty, a claimant 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.²

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 the Federal Employees' Compensation Act.⁴ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.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 an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.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 his or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁷

In emotional condition claims, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁸

² *Leslie C. Moore*, 52 ECAB 132 (2000).

³ 28 ECAB 125 (1976).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *See Robert W. Johns*, 51 ECAB 137 (1999).

⁶ *Lillian Cutler*, *supra* note 3.

⁷ *Kim Nguyen*, 53 ECAB 127 (2001).

⁸ *Dennis J. Balogh*, 52 ECAB 232 (2001).

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 the employee.⁹ 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.¹⁰ An employee's frustration from not being permitted to work in a particular environment or to hold a particular position is not compensable.¹¹ Likewise, an employee's dissatisfaction with perceived poor management is not compensable under the Act.¹²

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.¹³

ANALYSIS

In the present case, appellant has not attributed her emotional condition to the performance of her regular duties as a vehicle operations assistant or to any special work requirement arising from her employment duties under *Cutler*. Rather, appellant's claim pertains to her allegations of harassment by Ms. Boze and that employing establishment management allowed this situation to create a hostile work environment. The Board, however, finds that appellant has not submitted sufficient evidence to establish her allegations of harassment. The statements appellant submitted from coworkers are of limited probative value in this case. While they generally described problems the employees had with Ms. Boze, they provide no discussion for any specific harassment alleged by appellant. Ms. Pullgeers' hearing testimony concerns her problems with Ms. Boze and did not discuss specific allegations regarding appellant. The employing establishment controverted the claim and Mr. Lohmann advised that he found no disparate treatment regarding appellant's leave requests. After speaking with Mr. Miller, Ms. Boze and appellant, he found that her allegations were not substantiated by coworkers.

While the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to compensability.¹⁴ In this case, appellant provided no substantiation that Ms. Boze verbally abused her. Furthermore, an employee's dissatisfaction with perceived poor management is not

⁹ *Felix Flecha*, 52 ECAB 268 (2001).

¹⁰ *James E. Norris*, 52 ECAB 93 (2000).

¹¹ *Barbara J. Latham*, 53 ECAB 316 (2002).

¹² *Id.*

¹³ *James E. Norris*, *supra* note 10.

¹⁴ *Michael A. Deas*, 53 ECAB 208 (2001).

compensable under the Act.¹⁵ The Board finds that appellant did not submit sufficient evidence pertaining to alleged incidents of harassment arising at work. She alleged stress to hostile treatment by Ms. Boze and because the employing establishment management did not respond to the situation. Mr. Lohmann's statement contradicts this assertion. Appellant has not substantiated her allegations and has not established as factual her perceptions of harassment and a hostile work environment.¹⁶ The Board finds that she has not established a compensable factor giving rise to her emotional condition. Where, as here, appellant did not establish a compensable employment factor, it is not necessary to consider the medical evidence.¹⁷

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 federal employment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 9, 2005 be affirmed.

Issued: September 13, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹⁵ *Barbara J. Latham, supra* note 11.

¹⁶ *See Kathleen A. Donati, 54 ECAB ___* (Docket No. 03-1333, issued August 13, 2003).

¹⁷ *Id.*