

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DOLLY M. BETHANY and DEPARTMENT OF THE AIR FORCE,  
McGUIRE AIR FORCE BASE, N.J.

*Docket No. 97-70; Submitted on the Record;  
Issued May 19, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether appellant sustained an emotional condition in the performance of duty causally related to factors of her federal employment.

On February 3, 1994 appellant, then a 43-year-old education technician, filed a claim alleging that she sustained an emotional condition as a result of her federal employment. She attributed her claimed emotional condition to having a severe backlog of work and being required to perform unpaid overtime to catch up on the backlog,<sup>1</sup> verbal and physical abuse from her supervisor, Ms. Maryann Whittemore, being rushed by her supervisor to complete her work, being denied a transfer, being transferred to another position due to the conflict with her supervisor and being dissatisfied with her union's representation regarding her conflicts with her supervisor.

In a report dated November 9, 1993, an employing establishment security officer related that on that date appellant came to the security office and related an incident involving Ms. Whittemore. Appellant stated that Ms. Whittemore told her "I need to talk to you" but that she indicated that she was on her way to the front office. Appellant related that Ms. Whittemore stated, "We'll talk right here" and blocked appellant with her body, refusing to let her pass. The officer related appellant's statement that the two individuals "bumped bodies several times" before Ms. Whittemore allowed appellant to pass. The officer noted that the incident was reported to an individual in appellant's office<sup>2</sup> who stated that he would assume control of the situation and that no further action was taken by the security office.

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<sup>1</sup> At the oral hearing held in this case, appellant stated that her job duties, including completing the backlog of work, were not a factor in her claimed emotional condition.

<sup>2</sup> A Master Sergeant Haugh.

In a letter dated November 10, 1993, Ms. Whittemore advised appellant that she proposed to reprimand her for failure to follow a directive and defiance of authority. She stated that appellant was late for a scheduled mandatory staff meeting on November 8, 1993, walked in and out of the meeting several times without being excused, and interrupted individuals who were speaking at the meeting.

In a letter dated December 1, 1993, appellant responded to Ms. Whittemore's proposed reprimand by stating that she did not receive notice of the meeting from Ms. Whittemore until ten minutes after the meeting began and that she advised Ms. Whittemore that she would be late for the meeting because she was expecting two important work-related telephone calls. She stated that she proceeded to the meeting after her work was completed and participated in the discussions but had to excuse herself after approximately half an hour due to an appointment. Appellant stated that Ms. Whittemore harassed her at work and related that during a previous staff meeting an employee had insulted her but Ms. Whittemore refused to intercede and, when she complained, Ms. Whittemore told her, "If the shoe fits, wear it."

In a letter dated November 29, 1993, regarding a grievance filed by appellant against Ms. Whittemore concerning the November 9, 1993 incident in which Ms. Whittemore allegedly pushed appellant, Lieutenant Colonel Segundo Pereira stated that he had spoken to appellant, Ms. Whittemore and two individuals who overheard the incident but did not see the events. Colonel Pereira stated that he was unable to determine who initiated the incident and he denied appellant's request for a transfer.

A letter dated December 7, 1993 from the chief union steward stated that appellant had accepted a new position in settlement of her grievances against Ms. Whittemore.

In a report dated January 12, 1994, Dr. Jay D. Szathmary, a family practitioner, related that he first saw appellant on December 13, 1993 for stress and anxiety. He stated that appellant attributed her condition to stress at work caused by her immediate supervisor. Dr. Szathmary related appellant's statement that she was "assaulted" on four occasions when her supervisor pushed her, that the supervisor caused her to rush to complete her work, and that the supervisor screamed foul language at her. He diagnosed severe anxiety and panic attacks and recommended that appellant consult a psychiatrist.

In a report dated January 27, 1994, Dr. Michael A. Tricarico, a Board-certified psychiatrist, related appellant's complaint that Ms. Whittemore drank and had mood swings, was abusive and had physically pushed her. He stated that appellant taped parts of her conversations with Ms. Whittemore to document the abuse. Dr. Tricarico stated that the abuse was "well documented, not only on the tapes but also by other people who were working ... in [appellant's] office." He did not indicate whether he had heard these tapes himself or was only relating appellant's opinion that the abuse was well documented. Dr. Tricarico related that appellant was told by her union attorneys to accept a position that she felt had no potential for promotion and that she then hired her own attorney. He diagnosed post-traumatic stress syndrome.

In a report dated October 11, 1994, Dr. Leona F. Bard, a licensed psychologist, related that appellant was having problems with her supervisor. He related appellant's statement that she had smelled alcohol on Ms. Whittemore's breath and often found her behavior unusual and

inappropriate. Appellant asked another supervisor for a transfer which was denied and she felt that Ms. Whittemore became more abusive when she discovered that appellant had sought to be transferred. Dr. Bard related that appellant was later offered two positions which she felt were inferior to her regular job and that the union accepted one of the positions without her consent and then she felt she then could not refuse it. She stated that there was “no question ... that the cause of [appellant’s] emotional disablement is the treatment which she received at her job.”

In a letter dated November 7, 1994, Colonel Pereira stated that he had been appellant’s second level supervisor and was responding to her claim because Ms. Whittemore was no longer working at the employing establishment. He stated that the employing establishment did not concur with the allegations made by appellant. Colonel Pereira stated that he had been the grievance deciding official on numerous grievances filed by appellant but had not found evidence of harassment and could not substantiate her charges of assault. He stated that there was conflict between appellant and Ms. Whittemore but that much of the conflict was generated by appellant’s refusal to comply with Ms. Whittemore’s instructions and her conduct was such that disciplinary action was proposed.

By decision dated February 13, 1995, the Office of Workers’ Compensation Programs denied appellant’s claim.

By letter dated March 7, 1995, appellant requested an oral hearing before an Office hearing representative.

In August 1995, appellant’s attorney submitted a copy of a questionnaire that he had prepared and which had been completed by Ezell Watts, a co-worker, on September 23, 1994. The questionnaire included a question as to whether the co-worker had witnessed Ms. Whittemore commit any of the following actions in regard to appellant: make threats, act in a bizarre manner, shout or make intimidating remarks, verbally harass or exhibit discourteous behavior and perform aggressive physical acts such as pushing.<sup>3</sup> The co-worker checked “yes” regarding all of these except making threats and committing aggressive physical acts. Three other co-workers completed identical questionnaires but answered the questions only as they applied to their own interaction with Ms. Whittemore. They did not answer the questions regarding Ms. Whittemore’s treatment of appellant.

In an undated statement received by the Office in February 1996, Jeffrey W. Burch, a co-worker, related that on November 9, 1993 he overheard appellant say to Ms. Whittemore, “Do n[o]t block my way. Do n[o]t push me!”

In a statement dated November 23, 1993, received by the Office in February 1996, Sharon Gardner, a co-worker, related that on November 9, 1993 she overheard appellant saying “Do n[o]t block my way. Do n[o]t push me. Do n[o]t ever do that again,” but that she did not see the incident.

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<sup>3</sup> The questionnaire asked for a “yes” or “no” response as to whether Ms. Whittemore had directed any of these acts at the co-worker completing the questionnaire or towards appellant.

In an undated statement received by the Office in February 1996, Sergeant Patsy Funches related that on September 29, 1993 Ms. Whittemore told appellant that she had a document to give to her and there was no verbal response from appellant. She related that Ms. Whittemore repeated that she had a paper for appellant and asked appellant where she wanted it. Appellant told Ms. Whittemore to lay the document on the table and then Sgt. Funches heard appellant say, "As long as you live, do n[o]t ever shove another piece of paper in my face do you understand!" and Ms. Whittemore responded, "What am I suppose[d] to do I [a]m use[d] to handing paperwork to someone."

On February 28, 1996 a hearing was held before an Office hearing representative at which time appellant testified. Regarding the September 29, 1993 incident, she testified that Ms. Whittemore shoved a document in her face. Regarding the November 9, 1993 incident, appellant stated that Ms. Whittemore walked into her, pushing her back against the wall but stopped when she thought other employees were watching. She testified that Ms. Whittemore often screamed and yelled at her. Appellant repeated the other allegations concerning Ms. Whittemore which she had previously made. She testified that her actual duties, including the backlog of work, were not the cause of her emotional condition but rather it was her daily problems with Ms. Whittemore which caused her stress condition.

At the oral hearing, Sgt. Funches testified that Ms. Whittemore often interrupted employees as they went about their duties and would "nudge" them or stand close to them and look them "dead in the face" in an intimidating manner. She testified that Ms. Whittemore often yelled at appellant and was unreasonable in the way she treated appellant and the other employees but that she treated appellant worse than the others. Regarding the incident on September 29, 1993, she testified that Ms. Whittemore stood very close to appellant and asked what she should do with a document and appellant suggested that she just lay it down, that Ms. Whittemore again asked what to do with the document and appellant said, "Would you please lay it down." Sgt. Funches testified that the next thing she knew "the paper went in [appellant's] face" and appellant told Ms. Whittemore, "Do n[o]t you ever do that again."

In an undated statement received by the Office on March 25, 1996, Ms. Whittemore related that on September 29, 1993 she went to appellant and told her that she had a form which appellant had been working on and asked appellant where she wanted it placed and that appellant motioned toward a table. She related that she told appellant again that she had the form, asked her where she wanted the form and appellant again motioned toward a table. Ms. Whittemore told appellant, "I usually hand people things they need" but [I] put the form down and turned to walk away." She related that appellant began shouting "Do n[o]t ever shake a paper in my face again." Ms. Whittemore stated that she turned around with a shocked expression and appellant shook her finger at her saying, "You will never as long as you live shake another paper in my face." She stated that she turned and walked out, shocked and wondering why appellant was behaving in this manner when she was merely trying to expedite work.

By decision dated July 12, 1996, the hearing representative affirmed the Office's February 13, 1995 decision. The hearing representative noted that at the hearing appellant stated that her difficulties at work did not pertain to her assigned duties but rather to problems with her supervisor, Ms. Whittemore. The hearing representative stated that the evidence of record was

not sufficiently detailed or substantive to establish that Ms. Whittemore's actions toward appellant constituted abusive or erroneous behavior and therefore appellant had not met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

The Board finds that appellant has not met her burden of proof to establish that her claimed emotional condition was causally related to factors of her federal employment.

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 her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>4</sup> 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.<sup>5</sup>

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.<sup>6</sup> This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.<sup>7</sup>

In cases involving emotional conditions, the Board has held that, 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.<sup>8</sup> 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.<sup>9</sup>

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> See *Thomas D. McEuen*, 41 ECAB 387, 391 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>6</sup> *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

<sup>7</sup> *Effie O. Morris*, 44 ECAB 470, 473 (1993).

<sup>8</sup> See *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389 (1992).

<sup>9</sup> *Margaret S. Krzycki*, *supra* note 8.

In the present case, appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Regarding appellant's allegation that her union accepted a position on her behalf without her consent, this is an action of her union, not of the employing establishment, and is therefore not deemed a compensable factor of employment.

Appellant has also alleged that harassment and discrimination on the part of her supervisor, Ms. Whittemore, contributed to her claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and co-workers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.<sup>10</sup> However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.<sup>11</sup>

Regarding appellant's allegation that Ms. Whittemore harassed her by rushing her to complete her work, there is insufficient evidence of record for this allegation of harassment to be deemed a compensable factor of employment.

Regarding the September 29, 1993 incident when Ms. Whittemore allegedly shook a piece of paper in appellant's face, witness Sgt. Funches stated at the oral hearing that Ms. Whittemore asked where appellant wanted her to place a document, appellant asked her to lay the paper on the table, and then "the paper went in [appellant's] face." However, there is insufficient evidence to establish that Ms. Whittemore's action regarding the piece of paper rose to the level that could be considered harassment or an act of physical aggression. Therefore, this allegation is not deemed a compensable factor of employment.

Regarding the November 9, 1993 incident when appellant alleged that Ms. Whittemore pushed her, and appellant's allegation that Ms. Whittemore sometimes shouted at her, the Board has recognized the compensability of physical threats and verbal aggression in certain circumstances.<sup>12</sup> As for the November 9, 1993 incident, an investigation was conducted by Colonel Pereira who stated that he was unable to determine who initiated the incident and noted that two individuals overheard the incident but did not witness the alleged pushing. Therefore, there is insufficient evidence to establish this incident as factual or, if factual, that Ms. Whittemore touched appellant in such a way that it would be considered harassment and a compensable factor of employment. As for the shouting, co-worker Ezell Watts completed a questionnaire provided by appellant's attorney and checked "yes" to the question as to whether

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<sup>10</sup> *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

<sup>11</sup> *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

<sup>12</sup> *See Alton L. White*, 42 ECAB 666, 669-70 (1991); *David W. Shirey*, *supra* note 10 (recognizing the compensability of physical threats and verbal aggression).

he had observed Ms. Whittemore make threats or shout at appellant<sup>13</sup> but provided no details of any specific incidents such as dates and what was said. Sgt. Funches testified at the hearing that Ms. Whittemore yelled at appellant but she did not provide any information regarding specific incidents. Therefore this allegation cannot be deemed a compensable factor of employment.

In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors or co-workers. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Regarding Colonel Pereira's denial of appellant's request for a transfer because of the November 9, 1993 incident, the Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.<sup>14</sup> Therefore, this allegation is not deemed a compensable factor of employment.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.<sup>15</sup>

The decision of the Office of Workers' Compensation Programs dated July 12, 1996 is affirmed.

Dated, Washington, D.C.  
May 19, 1999

George E. Rivers  
Member

David S. Gerson  
Member

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<sup>13</sup> The witness indicated that he had not seen Ms. Whittemore commit any acts of physical aggression against appellant.

<sup>14</sup> *Michael Thomas Plante*, 44 ECAB 510, 515-16 (1993).

<sup>15</sup> As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, *supra* note 8.

A. Peter Kanjorski  
Alternate Member