

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SONIA I. ACOSTA and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE, Guaynabo, PR

*Docket No. 02-2333; Submitted on the Record;
Issued January 28, 2003*

DECISION and ORDER

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

The issue is whether appellant has established that she sustained an emotional condition within the performance of duty.

On September 13, 2001 appellant, then a 48-year-old paralegal specialist, filed a claim for stress and aggravation of a preexisting nervous condition. She contended that she worked in a hostile environment. She claimed that she was subjected to unwanted advances from her superior, Andres Nunez, and indicated that on August 21, 2001 she had a nervous breakdown in her office due to his abuse of power.

In an accompanying statement, appellant indicated that on July 19, 2001 Mr. Nunez insulted her with unprofessional conduct and profanity in a loud manner in front of coworkers, in order to humiliate her. She requested leave but he denied her request. She drove to the local airport for training but commented that she risked a fatal accident due to her nervous condition. On July 25, 2001 Myrna Pere sent appellant a memorandum accusing her of abandoning the employing establishment premises without authorization during training and failing to complete training. Appellant contended that she had finished training. Ms. Pere stated that Mr. Nunez denied appellant's request for leave because she did not have any leave balance. Appellant stated that she had a leave balance. Appellant commented that Ms. Pere accused her of not being an excellent employee and did not perform good service. Appellant replied that she had earned an outstanding evaluation four to five months previously and had been recommended for a within-grade pay increase. She stated that on August 2, 2001 Mr. Nunez, after meeting with Ms. Pere, ordered her in an aggressive voice to prepare a report on open and closed Freedom of Information Act and Privacy Act cases, to be delivered that day. Appellant indicated that Mr. Nunez asked for the report twice that afternoon. Appellant requested sick leave to see her psychiatrist and felt nervous due to Mr. Nunez's verbal aggression.

Appellant stated that on August 21, 2001 she talked to an equal employment opportunity counselor. When Mr. Nunez was informed that she spoke with the counselor, he became enraged and began looking at her with intimidating gestures. When appellant finished a

telephone call, she requested permission from Francisco Soto, her supervisor, to go to the administrative officer to solve a problem. Mr. Soto denied the request because appellant had taken 30 minutes in her telephone call. She began to feel sick and some coworkers came to help her. She alleged that Mr. Nunez came out of his office, looked at her in an intimidating manner and asked her in a derogatory manner what was wrong with her. He told her to go to the health unit, stating "I do not want to see her here." At the same time, a security guard informed appellant that her father had come to see her. She stated that Mr. Nunez refused to allow appellant's father to come to see her, in a loud voice, using "unwelcome" language. Appellant collapsed at that point, fell to the ground and a nurse was called to give her assistance. The nurse requested and received permission for appellant's father to see her. Appellant indicated that another supervisor, Maritza Soto, only observed and did not help. Instead, she commented that appellant and her father were security threats and should be removed from the employing establishment. Appellant stated that her father had to wait over an hour to see her.

On September 6, 2001 Mr. Soto ordered appellant to do clerical work and stop working on her backlog. She alleged that she was placed in a filing room and given an inadequate table and chair. She was instructed to label files from a file cabinet. She stated that when she received a telephone call, she went to her office to answer it and found that her telephone had been disconnected. She requested a meeting with the district director, but the request was denied. Appellant also alleged that her office was a mess because others had been allowed to use it while she was on leave and unauthorized people had been given access to it.

In a July 20, 2001 memorandum, Mr. Soto stated that appellant went to cardiopulmonary resuscitation training on July 19, 2001 but Mr. Nunez indicated that appellant left the training at 4:00 p.m. without completing the seminar. Appellant indicated that she left at 4:00 p.m. because that was the scheduled end of her workday. Mr. Soto informed her that when she was in training, her schedule was that for the training and she could not leave it early. He noted that appellant complained that Mr. Nunez was always screaming at her and asked Mr. Soto if he heard the screaming. He noted that appellant began crying and claimed that she could not go to the airport to finish training and take the test because of the mistreatment she was receiving. Mr. Nunez told her that she did not have any leave balance and that she should go to the training or else be listed as absent without leave. Mr. Soto stated that the comments of appellant and Mr. Nunez were at some point strong and firm but there was no screaming by either party.

In an August 23, 2001 memorandum, Mr. Soto indicated that on August 21, 2001 appellant asked to go to the administrative office to deliver some documents. He asked appellant if she could wait until the afternoon because she had work assigned to her for the day. However, as the cases being prepared for appellant were not ready, Mr. Soto told her to carry out her errand and return. He stated that a few minutes later, a coworker called and stated that appellant was in the litigation section and was having a problem. He went to the section and found appellant crying. He asked her what happened. She stated that she felt abused and intimidated by Mr. Nunez and could not take it anymore. Appellant also expressed concern over her backlog, noting that it had been greatly reduced when she left work for breast cancer surgery but had built up to 110 cases in two months. Appellant indicated that she could not get to the backlog because she had to do clerical work two days a week. Mr. Soto related that he would help appellant by going over the cases with her and giving her extra time if necessary to reduce her backlog. He indicated that he would need a daily report of the work she had completed. Mr. Soto indicated

that he attended a meeting with Mr. Nunez, Ms. Soto and others. When the meeting was over, he saw appellant crying. He related that a coworker came over with a leave request form. Mr. Soto informed Mr. Nunez of the leave request and was instructed to get a more detailed explanation of the purpose for the leave. Mr. Soto found out a few minutes later that appellant had a nervous breakdown. He stated that he monitored appellant's condition between naturalization interviews. He noted that the nurse recommended that it would be better if appellant was allowed to leave. He was also informed that appellant's father was in the waiting room. Mr. Soto stated that he did not interfere with appellant's father. He subsequently escorted appellant from the premises. He stated that the next day, appellant brought in a medical excuse.

In an undated response, Mr. Nunez stated that appellant did not complete training on June 19, 2001 because she left at 4:00 p.m. and had to return to complete the training. He indicated that the July 19, 2001 discussion about the training took place in his office and not in front of coworkers. He was not loud or disrespectful to appellant. In the August 21, 2001 incident, Mr. Nunez stated that Mr. Soto instructed appellant to carry out her assigned duties because she had been on the telephone for a long time. He indicated that appellant had been instructed to call the Equal Employment Opportunity (EEO) office later, after she completed her assigned duties. He stated that appellant was not denied permission to go to the administrative office but used the errand to request a meeting with Mr. Soto in the litigation section, where she complained about him. Appellant subsequently sought a meeting with the district director, but was informed that she was not available. Appellant complained that her father was in the lobby but was not allowed to meet with her. Her father, however, was allowed to join her while she was under the care of a nurse. Mr. Nunez stated that when he was informed appellant was sick, he stated that she should see the nurse. He indicated that appellant was not left alone and coworkers were with her until the nurse arrived. Mr. Nunez denied that he attempted to intimidate anyone. He stated that appellant was instructed to perform clerical duties and was relocated to a cubicle. Appellant was not required to perform duties that might be harmful to her but given light duty. He denied that her telephone had been disconnected. Mr. Nunez summarized that appellant had been undergoing psychiatric treatment for three years and was often in a touchy mood, which made it difficult to supervise her work.

In a December 7, 2001 letter, appellant repeated her allegations. She filed the EEO complaint on July 20, 2001 because of sexual harassment by Mr. Nunez. She stated that Mr. Nunez had commented on her "nice legs," had rubbed his left knee against her thigh, had asked appellant to kiss him and approached her face and had stated that appellant was a "very expensive woman." She alleged that on July 19, 2001 Mr. Nunez had asked who "the hell authorized her training." She claimed that Mr. Nunez had eavesdropped on her conversation on July 25, 2001 after she had filed her EEO complaint. Appellant alleged that after she reported sexual harassment, Mr. Nunez began harassing her with the assistance of other supervisors, particularly Ms. Soto, in front of her coworkers. Appellant stated that her access card was taken away. She claimed that Mr. Soto refused to accept a medical report from her physician but used the same report to find that she was unable to work. She indicated that requests for advance sick leave were denied.

In a March 15, 2002 decision, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that she had not established that her emotional condition was causally related to compensable factors of her employment.

Appellant requested reconsideration and submitted additional evidence. Appellant repeated she was denied an access card to the employing establishment and, therefore, had to get the help of coworkers to get around the employing establishment and use the restroom. She claimed that Ms. Soto monitored her presence at the employing establishment, often following her. She claimed that she was not permitted to perform her regular assigned duties and not allowed back into her old office to recover personal belongings.

In an August 28, 2002 decision, the Office denied appellant's request for reconsideration.

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty.

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act. 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 frustration from not being permitted to work in a particular environment or to hold a particular position. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.¹ When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.² In these cases, the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.³

Appellant contended that she was subjected to harassment from Mr. Nunez, particularly after she rejected sexual advances that he made. Mr. Nunez denied that he made any such advances or engaged in harassment. Appellant alleged that her emotional condition was due to harassment by her supervisors. The actions of a supervisor, which an employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act. However, there must be some evidence that such implicated acts of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. A claimant must establish a factual basis for allegations that the claimed emotional condition was

¹ *Lillian Cutler*, 28 ECAB 125 (1976).

² *Artice Dotson*, 41 ECAB 754 (1990); *Allen C. Godfrey*, 37 ECAB 334 (1986); *Buck Green*, 37 ECAB 374 (1985); *Peter Sammarco*, 35 ECAB 631 (1984); *Dario G. Gonzalez*, 33 ECAB 119 (1982); *Raymond S. Cordova*, 32 ECAB 1005 (1981); *John Robert Wilson*, 30 ECAB 384 (1979).

³ *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

caused by factors of employment.⁴ Appellant described specific incidents of what she considered to be harassment, such as the dispute over whether she left a training session early and the events of August 21, 2001, which resulted in her collapse at work. Appellant claimed that these incidents involved Mr. Nunez speaking to her in a loud voice in front of coworkers or giving her intimidating stares. She also contended that Ms. Soto monitored her activities around the employing establishment. Appellant, however, has not submitted sufficient evidence to substantiate her allegations concerning Mr. Nunez actually occurred as she described them or that these actions constituted harassment. Mr. Nunez denied that he spoke to appellant in front of her coworkers as she alleged and Mr. Soto stated that he never heard Mr. Nunez scream at appellant during this period. Mr. Soto did not see any physical contact between Mr. Nunez and appellant during the August 21, 2001 incident. Appellant has not submitted evidence from other witnesses of the events to substantiate that the events occurred as alleged. Appellant has not demonstrated that she was subjected to harassment at work.

Appellant noted that the July 19, 2001 arose from her early departure from a training session. The actions of management in considering this matter are an administrative action and, therefore, do not constitute a compensable factor of employment relating to appellant's assigned duties. The activities of August 21, 2001, related to appellant's emotional collapse and the treatment she received at the employing establishment, as well as her allegation that supervisors deliberately kept her father waiting. These activities are not related to appellant's assigned duties but to appellant's allegations of harassment by Mr. Nunez and her treatment following her collapse. There is no evidence from either incident that the actions of appellant's supervisors were in error or abusive.

Mr. Soto noted that appellant, during the August 21, 2001 incident, referred to her backlog of work as stressful. However, appellant has not attributed her emotional condition to the performance of her assigned duties. Rather, her allegations have centered on allegations of harassment and hostility by others in her workplace.

Appellant stated that after her returned to work, she was assigned clerical work, not allowed to resume her regular duties, not given an access card to the employing establishment and not allowed to return to her office to retrieve personal items. Appellant's reaction to performing clerical work and not her regularly assigned duties arose from not being permitted to perform a particular position or work in a particular environment. Therefore, this would not be a compensable factor of employment. This matter of not giving appellant an access card and not allowing access to her office are administrative matters not related to appellant's assigned duties. There is no showing that the employing establishment erred or was abusive in assigning appellant to clerical work, not providing her with an access card or in not allowing her to return to her office. Appellant, therefore, has not shown that the factors she identified as causing her emotional condition were compensable factors of employment as defined by *Cutler* and *McEuen*.

⁴ Joan Juanita Greene, 41 ECAB 760 (1990).

The decisions of the Office of Workers' Compensation Programs, dated August 28 and March 15, 2002, are hereby affirmed.

Dated, Washington, DC
January 28, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member