

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGARET A. SMITH and DEPARTMENT OF JUSTICE,
U.S. ATTORNEY'S OFFICE, Grand Rapids, MI

*Docket No. 03-840; Submitted on the Record;
Issued July 30, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained an emotional condition in the performance of duty.

On January 22, 2002 appellant, then a 45-year-old Assistant United States Attorney (AUSA), filed a claim for “[w]ork stress-related conditions, including depression, anxiety, hives and panic attacks.” She attributed her condition to management harassment; a December 6, 2000 meeting in which First Assistant United States Attorney (FAUSA) Joan Meyer raised her voice, pointed her finger, intruded into her personal space and denied her counsel; a two-week suspension; an order to relinquish possession of her case files “for inspection and scrutiny unlike any other [Assistant United States Attorney] in the office;” a March 15, 2001 order to record her time in 15 minute increments; confinement to a conference room on March 13 and 15 and April 6, 2001; and a failing performance appraisal on March 24, 2001.

In a March 2, 2002 response to appellant’s claim, her supervisor prior to January 6, 2001, FAUSA Phillip J. Green, stated that in March and April 2001, during preparation of her performance evaluation, he directed appellant to review a number of case files and respond to questions about her performance in the 2000 rating year, that she was asked to complete these assignments in the conference room, that she worked alone undisturbed until she completed the assignments at which point she was free to leave and that on one occasion his secretary accompanied her to the ladies’ room. FAUSA Green stated that none of appellant’s supervisors had “harassed her or treated her in an inappropriate fashion” and that several disciplinary actions had been taken against her for her misconduct: A May 1999 letter of reprimand for unprofessional conduct in criticizing a fellow AUSA, a June 2000 three-day suspension for deliberately and falsely accusing a coworker of assaulting her in a parking garage and a January 5, 2001 14-day suspension for making and spreading a false allegation that her supervisor had been consuming alcohol during the workday. FAUSA Green stated that, at the December 6, 2000 meeting appellant was questioned by FAUSA Meyer about her accusation that her supervisor was drinking during work hours, but that FAUSA Meyer remained in her chair and did not intrude on appellant’s personal space during this 15-minute meeting. FAUSA Green

stated that on March 16, 2001 Criminal Chief Mark Courtade issued a written directive to appellant to keep track of her work-related time in order to address her performance deficiencies, that on March 24, 2001 appellant received an unacceptable performance rating for the 2000 rating year, that on April 12, 2001 she was put on notice that Criminal Chief Courtade discovered that one of appellant's case files may have been tampered with, in that page of police reports referring to a tape-recorded statement, she claimed that she did not know about what had been removed, that on April 13, 2001 appellant "notified the office that she was taking extended sick leave, claiming, for the first time, 'work-related stress'" and that on May 22, 2001 she returned to the office and was placed on administrative leave.

By letter dated March 15, 2002, the Office of Workers' Compensation Programs requested that appellant submit further information regarding her allegations within 30 days.

By decision dated April 18, 2002, the Office found that appellant had not corroborated her account of a December 6, 2000 meeting, that she had not shown error in being confined to a conference room to complete assignments and that she had not shown error or abuse in her performance evaluation or disciplinary actions.

By letter dated May 2, 2002, appellant requested a hearing. At a hearing, held before an Office hearing representative on November 6, 2002 appellant testified that she was involuntarily transferred from the employing establishment's civil division to its criminal division in May 1999, that she had no prior criminal law experience and no desire to work in this division, that she was not assigned any criminal cases and did her leftover civil cases until she underwent surgery on June 30, 1999 and did half criminal and half civil cases upon her return to work in late August 1999. Appellant testified that, when she was assigned criminal cases she initially shadowed a senior prosecutor, that she attended a two-week basic criminal procedure course at the National Advocacy Center, but that this course was not basic enough and made no sense to her. She then testified that she was anxious and nervous when she was scheduled to first present a case before a grand jury, especially as another AUSA was observing this proceeding, that the more senior AUSA ended up doing this grand jury presentation and that she later did many grand jury appearances, always worried that another AUSA might show up. Appellant further testified that she was "overwhelmed" by her first jury trial and found it "very crushing" when the defendant was acquitted, that she had misgivings about her suitability to prosecute cases involving gun violations, that in March 2000, she spent a large portion of her time learning the nuances of gun law and that by that summer the number of cases she was handling was "really overwhelming." Appellant testified that she had expressed to her supervisor her serious doubts about whether her first trial involving gun charges in November 2000 should be prosecuted at all, that her stress level was quite high, that during jury selection she moved to strike the only two African-Americans in the jury pool, that the judge overruled her, that the Criminal Chief was "advising, instructing, ordering, telling, you know, but making clear to me as a subordinate" to try again the following day to persuade the judge to strike these potential jurors, that, when she did so the judge said or suggested, in her supervisor's presence, that he had never seen such blatant discrimination on the part of an Assistant United States Attorney, that this made her angry because she was blamed by a Federal judge in open court of being a racist, that her supervisor and the Criminal Chief made her accept responsibility before the judge for "merely doing what I was told by somebody much more senior, who is my supervisor," that the case was ultimately dismissed by her supervisor and that this episode was covered in the local newspapers.

FAUSA Green submitted a December 17, 2002 response to appellant's hearing testimony, stating that she was sent to four formal training courses between September 1999 and October 2000, including a 12-day course in April 2000, for new federal prosecutors with little or no trial experience and that appellant "was given the opportunity, unprecedented in the USAO's Criminal Division, to work full time with a mentor before being assigned any of her own cases." FAUSA Green continued that appellant was assigned to firearms cases in early 2000, as they were among the simplest cases the Criminal Division handled, that during a progress review in May 2000, he noted that appellant was making satisfactory progress on her pending cases and that he encouraged her to gradually increase her case load from 25 to 40 cases with the expectation of obtaining about 25 convictions for the year.

Additional evidence was submitted at and after the hearing, including appellant's May 19, 1999 reprimand for unprofessional conduct in criticizing the court performance of a criminal AUSA, her June 13, 2000 three-day suspension for falsely accusing an AUSA of misconduct in a parking garage on May 13, 1999, appellant's January 5, 2001 14-day suspension for falsely accusing her supervisor of drinking during the workday on November 30, 2000 and her March 23, 2001 performance appraisal for 2000, which found she failed to meet the standard for three of the five critical elements.

On January 22, 2002 appellant filed a civil lawsuit against the Attorney General of the United States, seeking damages and injunctive relief. The complaint alleged retaliation for representing another attorney in a civil rights complaint and for filing an Equal Employment Opportunity (EEO) complaint, sex discrimination, creation of a hostile work environment, retaliation for exercising First Amendment rights and violations of the Freedom of Information Act.

On April 25, 2002 the employing establishment issued appellant a notice of a proposal to remove her from her position and from federal service for intentional and unauthorized removal of documents from the employing establishment's files, concealment of material facts regarding her removal of these federal records, failure to comply with Department of Justice policy on dual and successive prosecution, failure to comply with the employing establishment's plea review policy in 11 cases, concealment and misstatement of material facts regarding her conduct in two trials, failure to follow her supervisor's directives and poor workmanship in three cases.

Appellant's suit was dismissed on October 8, 2002 as part of a settlement agreement between her and the employing establishment. In this settlement agreement, the employing establishment agreed to rescind appellant's suspensions and pay back pay for the periods of the suspensions, withdraw appellant's 1999 and 2000 performance evaluations, pay appellant \$40,000.00 and purchase a \$210,000.00 annuity contract, pay appellant's reasonable attorney's fees and costs, certify it was unable to reasonably accommodate her alleged disability if she claimed disability retirement, drop all pending or proposed disciplinary actions and not refer appellant to the Office of Professional Responsibility or the Office of the Inspector General, absent new information regarding other alleged misconduct. Appellant agreed to waive and release all claims against the employing establishment and its employees except for workers' compensation and disability retirement, dismiss her lawsuit and withdraw any pending complaint of discrimination and resign her position as an Assistant United States Attorney for medical reasons. The settlement states: "[I]t shall not constitute an admission of a violation of any law,

rule or regulation by the [d]efendant or any of its employees, nor shall it constitute an admission of any fact or allegation or of wrongdoing by [the p]laintiff.”

By decision dated January 24, 2003, an Office hearing representative found that appellant’s “emotional condition was predominantly self-generated and arose as a result of her conduct in her federal position.” This Office hearing representative found that the following were administrative or personnel actions for which error or abuse were not shown; training, disciplinary actions, monitoring of work, assessments of performance and administration of leave. Found not established as having occurred as alleged were confinement to a conference room, hostile work environment and harassment.

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

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 his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees’ Compensation 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.¹ Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee’s regular or specially assigned work duties, do not fall within coverage of the Act. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.²

Most of the factors to which appellant attributed her emotional condition involved administrative or personnel matters, which, as noted above are not covered under the Act, in the absence of a showing of error or abuse. She has not shown error or abuse in the employing establishment’s disciplinary actions.³ The May 19, 1999 reprimand for unprofessional conduct in criticizing the performance of another criminal AUSA on May 13, 1999 was supported by the accounts of the other three participants in the May 13, 1999 parking garage incident, are consistent and contrary to appellant’s account and appellant, in a May 19, 1999 counseling session, did not deny that she made the remark for which she was disciplined. Appellant has not shown error or abuse in the June 13, 2000 three-day suspension, which concerned this same May 13, 1999 incident, but was issued on the basis that she “deliberately and falsely accused three fellow AUSAs of misconduct.” No error or abuse was shown in the January 5, 2001 14-day suspension, for falsely accusing her supervisor of drinking during the workday on

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

² *Michael Thomas Plante*, 44 ECAB 510 (1993).

³ Disciplinary actions are administrative or personnel matters and do not fall within the coverage of the Act. *Sharon R. Bowman*, 45 ECAB 187 (1993).

November 30, 2000. Appellant has presented no evidence that the supervisor was in fact drinking or that she did not accuse him of doing so. The April 25, 2002 proposal to remove appellant also was not shown to be erroneous or abusive, as the findings relied upon for this proposal were taken from a September 28, 2001 investigation into appellant's alleged professional misconduct by the employing establishment's Office of Professional Responsibility. The fact that these disciplinary actions were rescinded in a settlement agreement does not establish error or abuse.⁴

Appellant has not shown error or abuse in her reassignment from the civil to the criminal division on May 19, 1999. Assignment of work duties are an administrative or personnel matter.⁵ Appellant has not shown that the training she was provided after her transfer was inappropriate.⁶ Even if her allegation that no other employee was required to keep track of their time in 15-minute increments, as she was beginning March 15, 2001, this does not show error or abuse,⁷ given her performance problems that resulted in her unsatisfactory performance evaluation on March 24, 2001. Even appellant's "confinement" to a conference room to review case files and respond to questions about her performance on March 13 and April 6, 2001 was not unreasonable,⁸ given her supervisor's difficulties in getting appellant to respond to his requests for information. Also not unreasonable was her supervisor's March 15, 2001 request that she provide him with a complete statement of her whereabouts on March 1, 2001, in which, he instructed her that she was not to consult with anyone before completing this statement. As appellant did not specify on which of these dates she was followed into the bathroom by her supervisor's secretary (the supervisor stated this occurred once), the Board is unable to judge whether this action was unreasonable.

Appellant also alleged that she was harassed by managers at the employing establishment. The Board has held that actions of an employee's supervisor, which the employee characterizes as harassment or discrimination may constitute factors of employment giving rise to coverage under the Act. 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 alone of harassment or discrimination are not compensable under the Act.⁹ Appellant has not submitted evidence that harassment or discrimination in fact occurred. As noted above, her account of the May 13, 1999 garage incident was contradicted by everyone else there. She also presented no corroboration of her allegation that FAUSA Meyer was abusive to her in a December 6, 2000 meeting; and FAUSA Green, who was at this meeting, denied that FAUSA Meyer was abusive to appellant.

⁴ *Michael Thomas Plante, supra* note 2.

⁵ *James W. Griffin*, 45 ECAB 774 (1994).

⁶ *Lorraine E. Schroeder*, 44 ECAB 323 (1992).

⁷ Monitoring of an employee's work is an administrative function of the employer. *Jimmy Gilbreath*, 44 ECAB 555 (1993).

⁸ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably. *Richard J. Dube*, 42 ECAB 916 (1991).

⁹ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

While none of the above allegations are covered under the Act, appellant's testimony at a November 6, 2002 hearing was that her work duties themselves were stressful and contributed to her emotional condition. The Board has held that emotional reactions to situations, in which an employee is trying to meet his or her position requirements are compensable.¹⁰ Appellant testified that she was anxious and nervous when she was scheduled to present her first case before a grand jury, that she was "overwhelmed" by her first jury trial and found it "very crushing," when the defendant was acquitted, that the number of cases she was handling in the summer of 2000 was "really overwhelming" and that her stress level was quite high during her first firearms trial. Appellant also testified that she was angry when a Federal judge blamed her in open court for being a racist, which is an exaggeration of the judge's remarks which were nonetheless critical of appellant.

As appellant's testimony at the Office hearing implicated a compensable factor of employment, the Board will analyze the medical evidence to determine if it establishes that the compensable factor contributed to appellant's emotional condition.¹¹ She submitted several medical reports that attributed her emotional condition to work without reference to any specific factors. In an April 23, 2001 report, Dr. Earl L. Burhans, an osteopath, stated that appellant's depression and anxiety were brought on by stresses at work. In a May 7, 2001 report, Dr. Irmina Targowski, a Board-certified family practitioner, stated that appellant's depression and anxiety were mostly related to stress at work. These reports are insufficient to meet appellant's burden of proof as they do not cite any specific compensable employment factors.

In a report dated July 22, 1999, Dr. Randall Wolthius, Ph.D., a clinical psychologist, specified two incidents: Appellant was upset with the tone of a supervisor's telephone call on August 9, 1999 and she received an unfair reprimand on September 7, 1999. The first of these incidents was not implicated by appellant in her claim and the reprimand was found by this decision of the Board not to be a compensable factor of employment. In a report dated January 15, 2003, Dr. Wolthius stated that appellant was first seen on June 3, 1999 after she was disciplined and involuntarily transferred and that, after treatment was terminated in November 1999, she was again seen in April 2001, after unduly harsh and abusive treatment by her supervisors. Dr. Wolthius also noted incidents in which appellant was required to report her whereabouts, confined to a conference room, log every 15 minutes of her time and was escorted to the bathroom. As discussed above, the factors cited by Dr. Wolthius either are not accepted to have occurred or are not compensable factors of employment. He did allude tangentially to one compensable factor, difficulty in learning a new area of law, but did not explain how this contributed to her emotional condition. The reports of Dr. Wolthius are not sufficient to meet appellant's burden of proof.

¹⁰ *Donna J. DiBernardo*, 47 ECAB 700 (1996); *Joseph A. Antal*, 34 ECAB 608 (1983).

¹¹ Appellant's burden of proof is not discharged by establishing an employment factor which may give rise to a compensable disability under the Act. To establish her occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that she has an emotional disorder that is causally related to the compensable employment factor. *William P. George*, 43 ECAB 1159 (1992).

The January 24, 2003 and April 18, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
July 30, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member