

management discussed her Equal Employment Opportunity (EEO) claim at meetings held on October 8, 16 and 17, 2003.¹ She stopped working on November 6, 2003 and did not return.

Appellant alleged that she was subjected to harassment by Judge Alan L. Bergstrom, the Chief Administrative Law Judge for whom she worked. She indicated that in a staff meeting with Judge Bergstrom on October 8, 2003 he discussed her EEO claim and advised those present that the allegations made in her claim were unfounded and unwarranted. She noted that she became very upset and used 80 hours of sick leave due to her emotional condition. Appellant alleged that the employing establishment offered to remove her from her current environment and transfer her to another position at a lower grade.

Appellant submitted an email from Marilynn Ellison dated October 8, 2003 which summarized a staff meeting held by Judge Bergstrom.² Ms. Ellison noted that Judge Bergstrom mentioned that coworkers had complained about a supervisor, who discussed an EEO claim and advised the group that the allegations by the supervisor were unfounded. Appellant submitted a note from her treating physician, Dr. Thomas J. Hogan, a Board-certified internist, dated November 5, 2003, who indicated that appellant was on leave for two weeks until her work situation resolved. On November 6, 2003 Dr. Hogan noted treating appellant for stress and anxiety resulting from problems with her supervisor. The physician diagnosed acute situational stress, anxiety, depression, hypertension, asthma and psoriasis which were exacerbated by her anxiety.

By letter dated December 4, 2003, the Office asked appellant to submit additional information including a detailed description of the employment factors or incidents which she believed had contributed to her claimed illness and a comprehensive medical report from her treating physician which included a reasoned explanation as to how the specific work factors or incidents identified by appellant had contributed to her claimed emotional condition.

Judge Bergstrom submitted a statement dated January 7, 2004 which indicated that appellant was hospitalized from January 31 to February 11, 2002, for respiratory problems which she attributed to her work environment. Upon her return to work, appellant filed a traumatic injury claim dated March 21, 2002 and an occupational disease claim dated April 9, 2002, alleging that her work environment caused her respiratory condition. Appellant requested a working condition accommodation which was denied by the employing establishment after a contractor inspected the premises and found no irregularities. Thereafter, appellant filed an EEO complaint. Judge Bergstrom noted that coworkers complained about appellant discussing her EEO claim in the workplace. An office meeting was held on October 8, 2003 to address individual concerns, worries, questions and morale in the workplace. Judge Bergstrom indicated that several topics were discussed including denied holiday leave requests, processing time in case assignments and complaints from the staff regarding appellant discussing her EEO complaint in the workplace. He noted that Gloria Bozeman, the regional management officer,

¹ On November 6, 2003 appellant filed a notice of traumatic injury and made the same allegations as those in her occupational disease claim filed November 7, 2003. The Office developed appellant's claim as an occupational disease.

² Ms. Ellison's email indicated that appellant was absent that day and on leave at the time of the meeting.

informed him that appellant was openly discussing her EEO complaint with coworkers who found the discussion disruptive. During the meeting, Judge Bergstrom noted that appellant's EEO claim was unresolved and he believed it to be unfounded and advised the staff that there was no requirement that anyone listen to or discuss the complaint with appellant.

In a decision dated February 26, 2004, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that the claimed emotional condition occurred in the performance of duty.

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.³ 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*,⁴ the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.⁵ 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 under the Act.⁶ When an employee experiences emotional stress in carrying out her employment duties and the medical evidence establishes that the disability resulted from her 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 her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of her work.⁷ 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 under the Act.

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.⁸ If a claimant does implicate a factor of

³ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁴ 28 ECAB 125 (1976).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

⁷ *Lillian Cutler*, *supra* note 4.

⁸ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

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.⁹

To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹⁰ However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.¹¹

ANALYSIS

Appellant alleged that at the staff meeting on October 8, 2003 Judge Bergstrom improperly discussed her EEO claim and advised those present that the allegations made in her complaint were unfounded and unwarranted. In the present case, Judge Bergstrom submitted a statement dated January 7, 2004 which indicated that appellant filed an EEO claim after a request for a work condition accommodation was denied by the employing establishment. Judge Bergstrom indicated that coworkers complained to him about appellant discussing her EEO claim in the workplace. He noted that at an office meeting on October 8, 2003 held for the purpose of discussing staff concerns, he addressed complaints from the staff regarding appellant's discussions of her EEO claim in the workplace. During the meeting, Judge Bergstrom noted that he believed appellant's EEO complaint was unfounded and advised the staff that there was no requirement that anyone listen to or discuss the complaint with appellant. The employing establishment contended that at no time did Judge Bergstrom harass appellant, he merely addressed concerns brought to his attention by the staff regarding appellant's discussion of her EEO complaint within the workplace.

General allegations of harassment are not sufficient¹² and in this case appellant has not submitted sufficient evidence to establish that she was harassed by her supervisor.¹³ Although appellant alleged that Judge Bergstrom made statements and engaged in actions which she believed constituted harassment, the evidence does not support her assertions. The Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.¹⁴ Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

⁹ *Id.*

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

¹¹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹² *See Paul Trotman-Hall*, 45 ECAB 229 (1993).

¹³ *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹⁴ *See Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

Appellant's other allegations of employment factors that caused or contributed to her condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*,¹⁵ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁶

Appellant alleged that Judge Bergstrom improperly discussed her pending EEO complaint at an office meeting on October 8, 2003. However, as noted above, Judge Bergstrom indicated that the purpose of the staff meeting was to address individual concerns and morale and he noted that a topic of concern brought to his attention and to that of Ms. Bozeman were complaints by coworkers regarding appellant's discussions of her EEO complaint in the workplace. Judge Bergstrom properly addressed this matter which was raised by appellant's coworkers and advised the staff that there was no requirement that anyone listen to or discuss the complaint.

The Board has determined that the manner in which a supervisor exercises his or her discretion falls outside the ambit of the Act. This principle recognizes that a supervisor must be allowed to perform his or her duties and that employees will at times dislike actions taken. Absent evidence of error or abuse, appellant's mere disagreement or dislike of a managerial action is not compensable.¹⁷ Appellant has presented no corroborating evidence to support that the employing establishment erred or acted abusively with regard to this allegation. Appellant has thus failed to establish a compensable factor of employment in this respect.

Appellant further alleged that she was forced to use 80 hours of sick leave due to her emotional condition. While the handling of time and attendance matters is generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹⁸ The Board has held that emotional reactions regarding leave are not compensable work factors where appellant offered no independent evidence that the employing establishment erred or acted abusively in these matters.¹⁹ In this case, appellant has not offered sufficient

¹⁵ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, *supra* note 4.

¹⁶ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁷ See *Barbara J. Latham*, 53 ECAB ___ (Docket No. 99-517, issued January 31, 2002).

¹⁸ See *Judy Kahn*, 53 ECAB __ (Docket No. 00-457, issued February 1, 2002).

¹⁹ *Michael Thomas Plante*, 44 ECAB 510 (1993).

evidence to establish error or abuse regarding her use of leave. Thus, she has not established administrative error or abuse in regard to this matter.

Appellant alleged that the employing establishment offered to remove her from her work environment and transfer her to a lower grade position. However, appellant submitted no corroborating evidence indicating that she was offered a transfer. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²⁰ To support such a claim, a claimant must establish a factual basis by providing probative and reliable evidence.²¹ In this case, appellant submitted no evidence indicating that she was offered a transfer or that the employing establishment erred or acted abusively. Appellant has thus failed to establish a compensable factor of employment in this respect.

In this case, the Board finds that the employing establishment acted reasonably in these administrative matters. Appellant has presented no corroborating evidence to support that the employing establishment erred or acted abusively with regard to these allegations.

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.²²

²⁰ See *Ruth S. Johnson*, 46 ECAB 237 (1994).

²¹ See *Barbara J. Nicholson*, 45 ECAB 843 (1994).

²² As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 6, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member