

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

APRIL R. WILLSON, Appellant

and

**DEPARTMENT OF AGRICULTURE, FOREST
SERVICE, Portland, OR, Employer**

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**Docket No. 05-625
Issued: January 17, 2006**

Appearances:
April R. Willson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 8, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated December 16, 2004, denying her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the 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.

FACTUAL HISTORY

On July 21, 2004 appellant, a 44-year-old assistant regional forester, filed an occupational injury claim alleging that she sustained a major depressive disorder and anxiety disorder as a result of incidents of her federal employment. She first became aware of her illness on June 8, 2003 and aware that her condition was caused by factors of her employment on February 2, 2004. Appellant noted that she filed an Equal Employment Opportunity (EEO)

complaint against management on February 2, 2004 due to a continuous pattern of harassment and that her work environment had become toxic.

Appellant submitted a July 28, 2004 letter from Dr. Per Sweetman, a Board-certified psychiatrist, indicating that he treated her on April 20 and June 23, 2004 for reported depression due to job stress, which worsened after appellant filed a grievance. She also submitted an August 28, 2002 report from Jonny K. Lee, a physicians' assistant, noting that she experienced recurrent migraine headaches.

In an undated letter received by the Office on August 5, 2004, Sandra M. Gonzalez, Ph.D., a licensed psychologist, stated that she treated appellant on April 7 and 14, May 3 and July 8, 2004. She diagnosed recurrent major depressive disorder and anxiety disorder. Dr. Gonzalez indicated that appellant's symptoms, which began four years earlier, had recently worsened to the degree that she experienced depressed mood, lack of energy or motivation to perform her job duties, sleep problems, anxiety and preoccupation about work with nervousness and obsessive thinking. She opined that appellant's mental health was connected to her place of employment, as evidenced by the onset of symptoms one year after she began working and the fact that she had no other stressful factors in her life. Dr. Gonzalez recommended that she be placed on a 90-day leave of absence.

By letter dated August 8, 2004, the employing establishment controverted appellant's claim, stating that she had been provided maximum flexibility, including the opportunity to telecommute on occasion and liberal sick and annual leave.

On a July 29, 2004 Mike Ash, deputy regional forester and appellant's supervisor, indicated that he had been unaware that she was being treated for depression until she filed her claim and that, therefore, he was unable to verify her symptoms. He stated that appellant had frequently talked of stressful situations in her personal life, including the hospitalization of a close friend that required her to take four weeks leave to care for the friend's children; carpal tunnel surgery in December 2003; the death of her dog in 2004; and her husband's six-month job detail to California, leaving her alone to maintain her home. Mr. Ash also reported that appellant had complained to executive team members that she was frustrated that people did not recognize her as part of the team. He indicated that the employing establishment would consider accommodations proposed by appellant's physician. In an undated attachment to her claim, appellant stated that she had been treated for depression and anxiety for four years and experienced depression, feelings of hopelessness, isolative behavior, anxiety, nervousness and obsessive thinking on a daily basis. She filed an EEO complaint alleging a continuous pattern of harassment over an extended period of time. Appellant indicated that she had not been treated for mental illness or experienced any of her current symptoms prior to her current employment.

In a letter dated April 2, 2004, Mr. Ash informed appellant that her recurring absences from work had an adverse impact on the regional civil rights program and reflected negatively on the leadership of the region. He noted that her staff experienced hardship when she was unable to provide ongoing management and support and noted that she often missed important meetings. Mr. Ash cited specific examples of absences that adversely affected the program, noting that appellant was two hours late on March 1, 2004 for a regular Monday meeting, noting two hours

late on March 2, 2004 ,not reporting to work following a doctor's appointment on the morning of March 5, 2005; she took a conference call and worked from home on March 9, 2004 without obtaining prior permission; and failed to attend an important "service first meeting" with the regional forester and stayed home all day on March 23, 2004 because her hot water heater was broken. Mr. Ash noted that her leave balances became negative on September 6, 2003. In 2003, appellant used 274.50 hours of annual leave; 105.75 hours of sick leave; and 168 hours of leave without pay, for a total of almost 14 weeks. As a result of her excessive absence, he placed restrictions on her use of leave. Appellant was required to obtain a supervisor's approval to take leave, not allowed to work at home or to earn or use credit hours without approval; and she was required to meet at least biweekly on her work priorities, work schedule and leave needs. She was permitted to deviate up to one hour from the pre-approved schedule and was encouraged to use a flexible work schedule, but to be on time for meetings and appointments. The memorandum provided that appellant's failure to request leave or receive approval in accordance with these procedures could result in a charge of absent without leave (AWOL). The restrictions were to remain in place for six months, at which time her attendance would be reevaluated.

In an undated response, appellant contended that her absences were for appropriate reasons, generally health related and had not had a negative impact on the employing establishment. She indicated that most of her leave was used to care for her elderly father. Appellant also took leave to recover from surgery on two separate occasions (six weeks and four weeks, respectively) and used two weeks of leave for severe bronchitis. She addressed Mr. Ash's specific allegations, noting that she had arrived late on March 1 and 2, 2004 due to depression; that on March 5 and 9, 2004 she was working at home, as she had been permitted to do on prior occasions; that she had not been responsible for organizing or conducting the March 23, 2004 meeting and that she could not attend the meeting because her hot water heater was broken and she was unable to take a shower.

In an April 23, 2004 memorandum, Mr. Ash advised appellant concerning implementation of a process by which she would inform him on a regular basis about her planned work schedule, leave use, credit hours and work-at-home periods. He would adjust her work schedule to accommodate medical appointments or illness. Mr. Ash indicated that, if appellant was requesting accommodation, she was required to provide medical documentation for clarification.

The record includes the job description for assistant regional forester for civil rights and time and attendance records for appellant for the period April 4 through 17, 2004 and June 27 through July 10, 2004.

By letter dated September 21, 2004, the Office notified appellant that the information submitted was insufficient to establish her claim. The Office advised her to submit a description of employment-related conditions or incidents that she believed contributed to her illness; specific aspects of her employment that she considered detrimental to her health; a description of all practices or incidents affecting her condition; copies of her EEO complaint; and a medical report describing symptoms, treatment and an explanation as to how the alleged work incidents or exposures contributed to her condition.

In a letter dated June 12, 2004, the employing establishment acknowledged receipt of appellant's EEO complaint dated May 16, 2004. In a narrative dated December 18, 2003 and

updated on February 29, 2004, she related numerous incidents of alleged harassment at the employing establishment. Appellant's allegations included the following:

1. On December 12, 2003 Mr. Ash insisted that appellant return to work after a morning meeting to discuss the budget, even though she had a scheduled surgery the following morning. She alleged that he was aggressive and told her she was inconsiderate to take leave during the holidays when others had "use or lose." Appellant alleged that Mr. Ash browbeat her for taking two to three weeks of leave. He also complained that her failure to carry a wireless telephone showed lack of commitment on her part and made it difficult to reach her when she traveled.
2. Mr. Ash failed to return telephone calls from appellant on December 16 and 17, 2003 and she noted that a December 17, 2003 email was "sharp and negative."
3. Mr. Ash "made a habit" of coming to appellant's office and asking her to do something immediately, "as though she could drop everything." She indicated that she "humored him" a few times to be polite but finally started saying "no" and asked to meet at a scheduled time.
4. Linda Goodman said things to demoralize appellant, such as, "You're just a director after all."
5. Ms. Goodman made a decision to remove appellant from the executive team. Appellant contended that she had been given the "cold shoulder." Ms. Goodman informed her that Mr. Ash would be doing her daily supervision."
6. Jim Golden made an inappropriate remark when reviewing calendars as a group. He asked why gay and lesbian individuals would be interested in natural resources.
7. On February 2, 2004 Mr. Ash came into appellant's office and handed her a document in front of another employee. The document indicated that she was to report directly to him. When appellant approached Ms. Goodman about the document, she was informed that Ms. Goodman did not have time for her and that the issue had previously been discussed. She then left for the day.
8. On February 4, 2004 Al Anderson, from personnel, asked appellant to sign a document abolishing her position. She became very upset because Mr. Ash had assured her the previous day in a mediation session that her title would remain the same. Appellant believed that the action was a deliberate act of retaliation for having initiated an EEO complaint on February 2, 2004.
9. On February 14, 2004 the Human Resources Director tried to convince appellant that she should allow her position to be abolished because she seemed so unhappy.
10. Appellant was not made aware of or invited to participate in a major two-day strategy team meeting on February 18 and 19, 2004 or new employee orientation

until she requested inclusion. She was also not asked to stand up in front with Ms. Goodman and Mr. Ash at the new employee orientation.

11. On February 23, 2004 Mr. Ash telephoned appellant at home for no pressing matter.

12. At an evaluation meeting held on February 25, 2004, Mr. Ash allegedly castigated appellant about the new employee orientation. He asked if she hated him. Appellant responded that she did not hate Mr. Ash and asked if he hated her. He responded that he did not hate her. Mr. Ash informed her that he and Ms. Goodman had an expectation that appellant would be available outside her required tour of duty on a regular basis.

13. On March 1, 2004 Mr. Ash informed appellant that she need not attend the "world tour" visits to the field. She considered this to be a retaliatory action against her.

14. On March 1, 2004 Mr. Ash implied that appellant was at fault for losing a letter.

15. On March 9, 2004 Mr. Ash telephoned appellant at home. She informed him that she was at home because she was expecting a sensitive call about her EEO complaint and needed to work at home. He complained that appellant had failed to ask permission to work at home. In a second telephone call, Mr. Ash insisted that she return to the office. Eventually, he agreed to allow appellant to take leave for the rest of the day. She contended that this was a verbal attack resulting from the filing of her EEO complaint and was a form of retaliation and harassment.

16. When appellant was on sick leave on March 11, 2004 she received a telephone call from Connie stating that an appointment scheduled for the following day had been moved from 8:00 a.m. to 7:30 a.m.

17. On April 2, 2004 appellant received a letter from Mr. Ash providing leave restrictions.

The record reflects a memorandum dated January 27, 2003 from appellant to Mr. Ash requesting advance leave to care for her father. She indicated that she had taken four weeks off to care for a friend's children and another three weeks off for wrist surgery. In a memorandum dated March 9, 2004, Mr. Ash informed Ms. Goodman that he had just been informed that appellant was planning to take a conference call and work at home that day. He telephoned appellant and informed her that she needed prior approval if she wanted to work at home. Mr. Ash noted that she informed him that she had filed an EEO complaint.

In an October 1, 2004 narrative, appellant contended that unfair and disrespectful treatment by management had caused emotional and physical disabilities and migraine headaches. She had previously been scheduled to take time off to recover surgery and had taken a sedative, when she discovered she was not on the hospital's schedule for surgery. She contended that the employing establishment thought the action was "deliberate" on her part. Appellant stated that she was assigned a "microscopic" office that was inadequate to meet her

needs or position, being at least 75 percent smaller than the offices of the other directors and not in the executive space. She stated that her staff consisted of the worst employees in the region and, therefore, her staff's performance caused embarrassment. Appellant alleged that she felt harassed and depressed and sought psychiatric help in April, 2004 when her symptoms became overwhelming.

In a letter dated October 22, 2004, the employing establishment contended that, invoking restrictions on appellant's leave was reasonable in light of her excessive absences. It further stated that it had accommodated many of her requests for leave and that her supervisor had engaged in mediation in order to improve communication.

Appellant submitted an unsigned Kaiser Permanente form dated October 22, 2004, from Dr. Adrienne Feldstein, who is certified by the American Board of Preventive Medicine. It provided a diagnosis of "modified[-]duty restrictions, suggest minimizing work with current supervisor and in stressful work location. Consider work under a different supervisor in different location, e.g., telecommuting." In response to a question regarding whether appellant's condition was a result of industrial exposure, Dr. Feldstein indicated "probable > 50 [percent]."

Appellant submitted a July 17, 2004 report from Carcle C. Anderson, FNP, stating that she had a condition requiring frequent use of the rest room. In a report dated April 20, 2004, Dr. Sweetman supported her request for a more flexible work schedule.

By decision dated December 16, 2004, the Office denied appellant's emotional condition claim, finding that she failed to establish any compensable employment factors.

LEGAL PRECEDENT

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 illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the medical evidence establishes that the disability results from an employee's emotional reaction to his or her regular or specially assigned employment duties or to a requirement imposed by the employing establishment, the disability comes within coverage of the Federal Employees' Compensation Act.¹ The same result is reached when the emotional disability resulted from the employee's emotional reaction to the nature of appellant's work or her fear and anxiety regarding her ability to carry out her duties.² By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of employment, such as when disability results from an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.³ Moreover, although administrative and personnel matters are generally related to employment, they are functions of the employer and not duties of the employee. Thus,

¹ 5 U.S.C. §§ 8101-8193.

² *Lillian Cutler*, 28 ECAB 125, 129 (1976).

³ See *Peter D. Butt, Jr.*, 56 ECAB ____ (Docket No. 04-1255, issued October 13, 2004). See also *Ronald K. Jablanski*, 56 ECAB ____ (Docket No. 05-482, issued July 13, 2005); *Barbara J. Latham*, 53 ECAB 316 (2002).

the Board has held that reactions to actions taken in an administrative capacity are not compensable unless it is shown that the employing establishment erred or acted abusively in its administrative capacity.⁴

When working conditions are alleged as factors in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment, which may be considered by a physician when providing an opinion on causal relationship and which are not deemed factors of employment and may not be considered. When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor.⁵ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence.⁶ As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim, but rather, must be corroborated by the evidence.⁷

With regard to emotional claims arising under the Act, the term harassment, as applied by the Board is not the equivalent of harassment as defined or implemented by other agencies, such as the EEO Commission, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under the Act, the term harassment is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coworkers. Mere perceptions and feelings of harassment will not support an award of compensation.⁸

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. 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.⁹

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that an emotional condition was caused or adversely affected by her

⁴ See *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004); see also *Ernest J. Malagrida*, 51 ECAB 287, 288 (2000).

⁵ *Margaret S. Krzycki*, 43 ECAB 496 (1992).

⁶ See *Charles D. Edwards*, *supra* note 4.

⁷ *Charles E. McAndrews*, 55 ECAB ____ Docket No. 04-1257, issued September 10, 2004); see also *Arthur F. Hougens*, 42 ECAB 455 (1991) and *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case, the Board looked beyond the claimant's allegations to determine whether or not the evidence established such allegations).

⁸ *Beverly R. Jones*, 55 ECAB ____ (Docket No. 03-1210, issued March 26, 2004).

⁹ *James E. Norris*, 52 ECAB 93 (1999).

employment.¹⁰ Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.¹¹

ANALYSIS

The Board finds that appellant has not established any compensable employment factors. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from the performance of appellant's regular duties, these could constitute employment factors.¹² 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.¹³ In the present case, appellant's supervisor denied that she was subjected to harassment or discrimination and she has not submitted sufficient evidence to establish her claim.¹⁴ She provided insufficient corroborating evidence to support her numerous allegations. Appellant alleged that Mr. Ash was aggressive; wrote emails with a sharp and negative tone; made a habit of asking her to do things "immediately;" handed her personal documents in the presence of a coworker; telephoned appellant at home for no pressing reason; castigated her for her behavior at a new employee orientation; told appellant that she need not attend a "world tour" visit in the field; failed to include her in or recognize her at team meetings; and accused appellant of being at fault for losing a letter. Her supervisors denied that he acted inappropriately and noted accommodation of most of appellant's leave requests and mediation to improve communications. Appellant provided no witness statements or other evidence to document any of her allegations, including her allegation that Ms. Goodman made derogatory statements to her or "gave her the cold shoulder and that Mr. Golden made inappropriate remarks." Her allegations, alone, are insufficient to establish a factual basis for her claim.¹⁵ Appellant's general allegations that she was treated unfairly and disrespectfully by management are insufficient to establish that harassment did, in fact, occur. The Board finds that she has not established a compensable employment factor with respect to these allegations.

The record reflects that appellant filed an EEO complaint. Grievances and EEO complaints by themselves, do not establish that workplace harassment or unfair treatment occurred.¹⁶ Where an employee alleges harassment and cites specific incidents, the Office or other appropriate fact finder must determine the truth of the allegations. The issue is not whether the claimant has established harassment or discrimination under EEO standards. Rather, the issue is

¹⁰ See *Charles D. Edwards, supra* note 4.

¹¹ See *Ronald K. Jablanski, supra* note 3. *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

¹² See *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹³ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁴ 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).

¹⁵ See *Charles E. McAndrews, supra* note 7.

¹⁶ See *James E. Norris, supra* note 9. See also *Parley A. Clement*, 48 ECAB 302 (1997).

whether the claimant has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹⁷ Appellant has failed to do so in the instant case.

In the present case, appellant has not attributed her emotional condition to the performance of her regular duties or to any special work requirement arising from her employment duties under *Cutler*, nor has she implicated her workload as having caused or contributed to her emotional condition. The Board finds that appellant's allegations that her supervisor engaged in improper disciplinary actions, wrongly placed her on leave restrictions and otherwise unfairly modified her work assignments relate to administrative or personnel matters, unrelated to the her regular or specially assigned work duties and do not fall within the coverage of the Act.¹⁸ Although the handling of disciplinary actions and leave requests, the assignment of work duties and the monitoring of work activities are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹⁹ The Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²⁰ The Board finds that appellant has not submitted sufficient evidence to show that the employing establishment committed error or abuse with respect to these matters. On the contrary, the evidence presented establishes that the employing establishment acted reasonably in modifying appellant's duties and restricting her leave, in light of her excessive absences. Therefore, she has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant alleged several instances of verbal abuse. She claimed that on December 12, 2003 Mr. Ash was aggressive and told her that she was inconsiderate to take leave during the holidays. Appellant contended that he browbeat her for taking two to three weeks leave and complained that she could not be reached by telephone when she was on leave. She indicated that he habitually came into her office and asked her to do something "immediately" and that he verbally attacked her on March 9, 2004 for failing to ask permission to work at home. Appellant also alleged that Ms. Goodman told her that she did not have time for appellant and said things to demoralize her, like "You're just a director after all." While the Board has recognized the compensability of verbal abuse in certain situations, this does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.²¹ While the manner

¹⁷ See *James E. Norris*, *supra* note 9. See also *Michael Ewanichak*, 48 ECAB 354 (1997);

¹⁸ See *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

The Board notes that appellant's attorney stated at the January 24, 2004 hearing that the events that occurred on March 12, 2003 were the alleged cause of appellant's condition and that any other allegations in the record were merely background. Therefore, the Board has addressed only those incidents alleged to have occurred on March 12, 2003.

¹⁹ *Id.*

²⁰ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

²¹ See *Leroy Thomas, III*, 46 ECAB 946, 954 (1995).

and tone of appellant's supervisors may have made her uncomfortable, the Board finds that the alleged statements of appellant's supervisors did not constitute verbal abuse or harassment.²²

Appellant generally indicated that she felt devastated by her supervisor's treatment and believed that their actions were retaliatory in nature. However, under the circumstances of this case, the Board finds that her emotional reaction must be considered self-generated, in that it resulted from her perceptions regarding her supervisors' actions.²³

Appellant alleged that she was depressed as a result of being given a "microscopic office" that was totally inadequate to meet her needs or position, being at least 75 percent smaller than the offices of the other directors and not in the executive space. Her frustration from not being permitted to work in a particular environment is not a compensable factor under the Act.²⁴

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.²⁵

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

²² See *Denis M. Dupor*, 51 ECAB 482, 486 (2000).

²³ See *David S. Lee*, 56 ECAB ____ (Docket No. 04-2133, issued June 20, 2005).

²⁴ See *Cyndia R. Harrill*, 55 ECAB ____ (Docket No. 04-399, issued May 7, 2004).

²⁵ 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 5.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 16, 2004 is affirmed.

Issued: January 17, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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