

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

P.R., Appellant)

and)

DEPARTMENT OF JUSTICE, FEDERAL)
BUREAU OF INVESTIGATION,)
Washington, DC, Employer)

Docket No. 07-1800
Issued: March 11, 2008

Appearances:
Jacob Kamerow, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 26, 2007 appellant, through counsel, filed a timely appeal of the March 28, 2007 merit decision of an Office of Workers' Compensation Programs' hearing representative, finding that she did not sustain an emotional condition while in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this appeal.

ISSUE

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

FACTUAL HISTORY

On March 8, 2006 appellant, then a 31-year-old legal administrative specialist, filed an occupational disease claim. On March 6, 2006 she first became aware of her migraines and hypertension. On March 14, 2006 appellant realized that her conditions were caused by work-related stress. She stated that she was unable to perform her work duties as her conditions affected her ability to concentrate and to stay focused.

In a March 7, 2006 narrative statement, appellant attributed her emotional condition to a question from Carla Smith, a workers' compensation contact person. On December 25, 2006 she had a medical appointment and Ms. Smith inquired as to whether she notified her supervisor when she had such appointments. Appellant alleged that she had been having problems with Leona R. Pratt, an acting unit chief, on a daily basis since she returned to work in November 2005 after being on sick leave for 10 months.¹ On February 8, 2006 Betty Weaver, her immediate supervisor, and Valarie Claiborne, a supervisor, asked appellant about the whereabouts of a "mandatory." Neither appellant nor Ms. Claiborne could locate the document. Appellant suggested that Ms. Weaver obtain a copy from the employing establishment's library and Ms. Weaver responded that she might do so. About five minutes later, Ms. Weaver returned to her office and rolled her eyes around when she requested that appellant and Ms. Claiborne search again for the document. In a normal tone of voice, appellant stated that she was sick of everyone and that she wanted to go to the office of David Hardy, the section chief. She alleged that she had a set of keys made and on the next day they were bent. Appellant further alleged that Ms. Weaver's contention that she had lashed out at her was false and that she had a witness statement to support her position. She alleged that an envelope containing two memoranda which she had sealed was opened and resealed on her desk. Appellant advised Ms. Pratt that someone bent her cabinet keys, a label on her inbox was missing and that mail she had placed in her inbox had been placed in a corner on her desk. Ms. Pratt requested that the employing establishment police unit take a statement from appellant regarding the allegations. Appellant accused Ms. Pratt of opening the envelope and leaving the memorandum on her desk. She alleged that on December 21, 2005 and January 30 and March 2006, she was harassed by Mr. Hardy and Nancy Steward, a coworker, who tried to intimidate her by watching her.

By letter dated April 17, 2006, the Office requested that the employing establishment provide comments regarding appellant's allegations. It also requested a copy of her position description and comments regarding her ability to perform the duties of this position. On April 17, 2006 the Office also advised appellant that the evidence submitted was insufficient to establish her claim. It addressed the additional factual and medical evidence she needed to submit.

In an April 24, 2006 letter, appellant attributed her emotional condition to heated unscheduled meetings she had with Clyde Banks, her supervisor, who instructed her to not e-mail anyone in the unit, Ms. Weaver or Ms. Claiborne, or ask anyone to prepare a statement. She was further instructed to be the only person to put correspondence in Ms. Pratt's mailbox and to not talk about her. Appellant received a verbal warning on April 11, 2006 for asking a supervisor and her peers to put correspondence in Ms. Pratt's mailbox. She alleged that Ms. Pratt harassed her for putting her leave slip in the wrong box in the presence of Theresa Morris, a coworker.

In a May 18, 2006 letter, Ms. Pratt contended that appellant's allegations were untrue, noting that she had difficulty conforming to policies and procedures. She noted that appellant also struggled with facts and respect for the employing establishment. Whenever appellant was informed of policies, she habitually filed a claim with the Equal Employment Opportunity (EEO)

¹ The record reveals that appellant was involved in an automobile accident at work in November 2005.

Commission against managers. Ms. Pratt became appellant's supervisor in the latter part of 2004 and their professional relationship was cordial until appellant asked her about workers' compensation policies. Appellant disregarded her responsibility to provide appropriate and timely information about her medical appointments. Ms. Pratt noted that appellant routinely called in at off hours requesting placement on leave without pay/workers' compensation (LWOP/WC) status and would call back another day to change her request to use of annual leave. Appellant used a full day for medical appointments after being informed that she could only take four hours of LWOP/WC unless her time off was related to a workers' compensation claim and she was undergoing a procedure. On January 25, 2006 the employing establishment's workers' compensation office advised appellant about its policies and she became aggravated. Appellant started a chain of unprofessional e-mails to Ms. Pratt on a daily basis. Ms. Pratt noted that she encouraged appellant to discuss this matter with her but she refused.

Ms. Pratt denied that appellant was harassed at work, noting that this was inconceivable since she was only present at work two or three full days per month. She had received complaints from appellant's managers and peers who stated that her behavior had become disruptive and irresponsible. Appellant requested that her coworkers sign sworn statements relating that Ms. Pratt had been tampering in her office while she was out, that Ms. Pratt had bent her keys and left her private documents in plain view, that they witnessed Ms. Pratt leaving information in her incoming box. Ms. Pratt stated that an investigation found that appellant's complaints that her managers were following her were false.

Ms. Pratt stated that appellant was given reasonable accommodations by being reassigned to another team. On the second day of this assignment, appellant accused her supervisors of talking about her. Ms. Pratt ensured that appellant was provided with reasonable accommodations since her return to full-duty work on November 1, 2006, which included training, computer access and all the necessary requirements regarding technology. Appellant was also informed that she could be reassigned if she found it difficult to remain in the new assignment. Ms. Pratt stated that appellant did not receive this information well and threatened a manager that she would inform her attorney of her statement. Appellant was able to perform her required work duties and was meeting her production standards. When she could not meet an increase in her standards, she was given reasonable accommodations which did not expect her to meet the same goals as the other employees in her unit. Ms. Pratt concluded that appellant's conduct had caused her peers not to trust her or care to be in the same area with her. She submitted a description of appellant's legal administrative position.

By decision dated September 18, 2006, the Office found that appellant did not sustain an emotional condition in the performance of duty. It found that she failed to establish a compensable factor of her employment.

On October 13, 2006 appellant requested an oral hearing before an Office hearing representative.

Appellant submitted a February 7, 2006 police report indicating that an investigation would be conducted regarding her allegations. She also submitted several narrative statements, an e-mail and letters from her coworkers. In a March 7, 2006 statement, Diane Kennedy stated that, at approximately 10:00 a.m. on that date, appellant informed her that someone had moved

things around on her desk. Appellant told her that she had placed a sealed envelope, containing personal information, on Ms. Pratt's desk and that the envelope had been returned to her desk without the seal. She informed Ms. Kennedy that someone had removed a label from her outgoing box on her desk and that a key to her cabinet had been bent as if someone had tried to open a cabinet. In a March 8, 2006 statement and March 10, 2006 e-mail, Ms. Kennedy related that she wished to correct her prior statement. She stated that she did not witness the incidents involving appellant, rather appellant told her about them. In a February 28, 2006 letter, Erma D. Cole stated that she did not recall any events on February 8, 2006. After a brief discussion with Ms. Weaver, Ms. Cole remembered Ms. Weaver and Ms. Claiborne going into appellant's cubicle several times. She recalled Ms. Claiborne laughing out loud on one occasion. Ms. Cole stated that nothing else came to mind, and she did not overhear any conversations. In an undated statement, Leslie S. Gayman related that at no time did she witness appellant acting in an unprofessional manner. She did not recollect appellant causing a disturbance on February 8, 2006.

In a March 8, 2006 statement, Ms. Claiborne stated that on February 8, 2006 she and appellant unsuccessfully looked for a "mandatory" as requested by Ms. Weaver who stated that she would obtain another copy from the library. She noted appellant's statement that she was sick of everyone and that they could walk to Mr. Hardy's office. Ms. Claiborne believed appellant's comment was made out of frustration, as she had come to her on several occasions contending that her cubicle had been searched. She responded that she did not and would not search a cubicle without the presence of the employee. Ms. Claiborne stated that appellant's comment did not disrupt the unit. There was no loud outburst or disruption. Ms. Claiborne indicated that appellant used a very normal tone of voice and no one in the unit knew what was going on except Ms. Weaver and herself.

In a February 9, 2006 memorandum, Ms. Pratt advised appellant that her behavior on February 8, 2006 was disruptive to her peers. She instructed her to undergo counseling in the Employee Assistance Program (EAP).

Appellant submitted additional statements and e-mails reiterating harassment at the employing establishment. In an undated statement, she denied distracting her peers from performing their work. Appellant stated that she never complained to anyone at work about being stressed and had always acted professionally at work. She contended that she was harassed for requesting a transfer on many occasions based on her physician's support. Appellant alleged retaliation against her for filing an EEO complaint.

On February 8, 2006 appellant and Ms. Pratt exchanged e-mails regarding appellant's placement of a leave slip for that date. She inquired as to why her leave slip was still in Ms. Pratt's box unsigned. Appellant stated that Ms. Pratt advised her that she never checked that particular box. Ms. Pratt denied that the leave slip was in her box, noting that she only had one box. She informed appellant that she had incorrectly placed the leave slip in a box designated for work and that it should have been placed in her inbox as she had done on previous occasions. Ms. Pratt noticed the leave slip in the box but did not know it was appellant's leave slip. She instructed appellant to put any mail for her in her inbox. Appellant denied having previously put her requests in Ms. Pratt's inbox. She agreed to put her leave slips in her box since she realized that Ms. Pratt would not sign them unless she did so. In a March 8, 2006 e-mail, Ms. Pratt

advised appellant that she had asked the employing establishment's police department to obtain a statement from her regarding her allegations that someone was going through her cabinet, drawers and incoming box.

In an April 18, 2006 letter, Timothy C. Campbell, chief of the inspection division, stated that no further action would be taken concerning appellant's allegations of misconduct or criminal activity on the part of employing establishment employees. He stated that appellant failed to provide any specific information to substantiate misconduct by any identified employee.

At a February 6, 2007 hearing, appellant reiterated her prior allegations of harassment by the employing establishment.

By decision dated March 28, 2007, an Office hearing representative affirmed the September 18, 2006 decision.²

LEGAL PRECEDENT

A claimant 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 factors of her federal employment.³ To establish that she sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; (2) medical evidence establishing that she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.⁴

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*,⁵ 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.⁶ 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.⁷ 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

² Following the issuance of the Office hearing representative's March 28, 2007 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

³ *Pamela R. Rice*, 38 ECAB 838 (1987).

⁴ *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁵ 28 ECAB 125 (1976).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

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.⁸ 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.⁹ 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.¹⁰

Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.¹¹ 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.¹² However, 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.¹³

ANALYSIS

Appellant attributes her emotional condition to harassment by her supervisors and coworkers. She alleged that on February 8, 2006 Ms. Weaver rolled her eyes at her while insisting that she and Ms. Claiborne look for a "mandatory" after she had suggested that Ms. Weaver obtain a copy of the missing document from the library. Appellant denied Ms. Weaver's allegation that she lashed out at her when she responded to the incident by stating that she was sick of everyone. She stated that she never distracted her coworkers and was professional at work. Appellant alleged that Ms. Pratt opened a sealed envelope containing personal information and then placed it back on her desk unsealed. She contended that Ms. Pratt

⁸ *Lillian Cutler*, *supra* note 5.

⁹ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹⁰ *Id.*

¹¹ *Lillian Cutler*, *supra* note 5.

¹² *Michael L. Malone*, 46 ECAB 957 (1995).

¹³ *Charles D. Edwards*, 55 ECAB 258 (2004).

harassed her for putting her leave slip in the wrong box. Appellant also contended that Ms. Smith asked her whether she notified her supervisor when she had a medical appointment. She stated that, on three occasions, Mr. Hardy and Ms. Steward tried to intimidate her by watching her. Appellant also stated that, during a heated meeting, Mr. Banks instructed her to not e-mail anyone in her unit, Ms. Weaver or Ms. Claiborne, a supervisor, or ask any to prepare a statement. Mr. Hardy further instructed her to be the only person to place correspondence in Ms. Pratt's mailbox and to refrain from speaking to her. Appellant noted that she received a verbal warning for asking her coworkers to put correspondence in Ms. Pratt's mailbox. She stated that someone bent her keys while trying to open her file cabinet and that a label had been removed from her outgoing box. Appellant contended that her requests for a transfer were denied on many occasions and that the employing establishment retaliated against her for filing an EEO complaint.

The Board has held that actions of an employer which the employee characterized as harassment may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that the harassment did in fact occur.¹⁴ Mere perceptions and feelings of harassment or discrimination will not support an award of compensation.¹⁵ Ms. Kennedy initially stated that appellant's sealed envelope had been returned to her desk unsealed, that a label was removed from her outgoing box and that her cabinet key was bent. However, she later acknowledged that she did not witness any of these incidents. Rather, they were related to her by appellant. Ms. Cole stated that she did not witness the February 8, 2006 incident. She saw Ms. Weaver and Ms. Claiborne go into appellant's cubicle several times but only remembered Ms. Claiborne laughing out loud on one occasion. Ms. Cole could not hear what was being said by the three women. Ms. Gayman stated that she did not recall appellant acting unprofessionally or causing a disturbance on February 8, 2006. However, she did not state that she had witnessed the alleged incident. Although Ms. Claiborne stated that appellant's February 8, 2006 comment did not disrupt the work unit as she used a normal tone of voice and was not loud, her belief that the comment was made out of frustration due to appellant's cubicle having been previously searched is not substantiated by the record. The employing establishment's investigation found that appellant failed to provide any specific information to substantiate misconduct by any identified employee.

Ms. Pratt denied that appellant was harassed. She stated that she was not credible as she failed to follow policies and procedures such as, providing timely information about her medical appointments and calling into work at an inappropriate hour to request leave and then changing her leave status. Ms. Pratt also stated that appellant habitually filed EEO claims. She related that appellant became aggravated when she was advised about the employing establishment's workers' compensation policies. Ms. Pratt stated that appellant's behavior had intensified, noting her February 8, 2006 comment. She indicated that prior to this comment she had received complaints from appellant's managers and peers about her disruptive and irresponsible behavior. Ms. Pratt stated that appellant asked her coworkers to submit statements indicating that she was tampering with her office. She noted that an investigation initiated by her, did not substantiate appellant's allegation. Ms. Pratt stated that she advised appellant about the proper place to put

¹⁴ *James E. Norris*, 52 ECAB 93 (2000).

¹⁵ *Reco Roncoglione*, 52 ECAB 454, 456 (2001).

her leave slips. She noted that the employing establishment provided appellant reasonable accommodations for her physical restrictions. Based on the statements of Ms. Kennedy, Ms. Cole and Ms. Pratt, the Board finds that appellant has not submitted evidence sufficient to establish that she was harassed by the employing establishment.

Moreover, appellant's allegations regarding the employing establishment's leave policies,¹⁶ monitoring of work,¹⁷ disciplinary actions including oral reprimands¹⁸ and denial of requests for transfer¹⁹ relate to administrative and personnel matters, which are noncompensable unless the employee shows that the employing establishment erred or acted unreasonably.²⁰ Similarly, the filing of complaints relate to a noncompensable administrative and personnel action.²¹ The Board has held that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.²² In this case, the record does not contain a final decision regarding a grievance or any other EEO claim. Appellant has not substantiated that the employing establishment erred or acted abusively with regard to its leave policies, verbal reprimands or denial of her requests for a transfer. Accordingly, she has not established a compensable factor of employment.²³

CONCLUSION

As appellant has not identified any compensable factors of her employment, the Board finds that she has failed to establish that she sustained an emotional condition in the performance of duty.

¹⁶ *Barbara J. Nicholson*, 45 ECAB 803 (1994); *Diane C. Bernard*, 45 ECAB 223 (1993).

¹⁷ *Lori A. Facey*, 55 ECAB 217, 224 (2004).

¹⁸ *Charles D. Edwards*, *supra* note 13.

¹⁹ *Ernest J. Malagrida*, 51 ECAB 287 (2000).

²⁰ *Andrew J. Sheppard*, 53 ECAB 170, 173 (2001).

²¹ *Michael A. Salvato*, 53 ECAB 666, 668 (2002).

²² *Michael L. Deas*, 53 ECAB 208 (2001).

²³ As appellant has not submitted the necessary evidence to substantiate a compensable factor of employment as the cause of her emotional condition, the medical evidence regarding appellant's emotional condition need not be addressed. *Karen K. Levene*, 54 ECAB 671 (2003).

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2007 and September 18, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 11, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board