

On July 25, 2006 appellant, then a 46-year-old transportation security screener, filed an occupational disease claim alleging that she sustained anxiety and depression as a result of sexual harassment by a supervisor. In May 2006 she filed an Equal Employment Opportunity (EEO) complaint against the supervisor.

Appellant submitted statements to the employing establishment alleging sexual harassment by Deborah Valentin, a supervisor.¹ On July 21, 2005 she described harassing telephone calls. On July 17, 2005 Ms. Valentin loitered near appellant's workstation. In a July 12, 2006 statement, appellant related that on May 31, 2006 Ms. Valentin silently watched another supervisor give her a test.

By letter dated July 13, 2006, David Beecroft, a federal security director with the employing establishment, notified appellant that he recently became aware of her concerns about Ms. Valentin. He stated:

"It has also come to my attention that you started this process over two years ago and that you gave a letter to a [s]creening [m]anager. He says he remembers receiving a letter from you but does not remember the specifics of the letter or what happened to it. I also understand that you had discussed this with another [s]creening [m]anager and with [human resources]. It is my responsibility to build an environment where employees can make their concerns known and to follow up, as needed. I apologize that we do not have your original letter and I apologize that I was unaware until just recently of your concerns. We should have done a better job of meeting your expectations."

In a statement received by the Office on September 13, 2006, appellant related that Ms. Valentin repeatedly asked her to go out for drinks and showed her "pictures of her gay friends and the gay nightclub she had attended that Halloween 2003." On Valentine's Day 2004 Ms. Valentin kissed appellant on the lips. Coworkers teased appellant about her "girlfriend." Ms. Valentin became hostile toward appellant because she refused her advances. She criticized appellant's work methods and then stroked her forearm and told her that she cared for her. Appellant requested that a coworker repay money that she had lent to her. Ms. Valentin intervened and made the situation worse. A passenger became upset that appellant touched his laptop and Ms. Valentin insisted that the passenger write out a complaint. Ms. Valentin stopped appellant from making a home video for a coworker even though she had permission from management. She visited appellant when she worked in the baggage area. Ms. Valentin told appellant that if she was "a man I would slap you on the butt." When appellant returned to the checkpoint, she was distracted and a security breach occurred. Ms. Valentin tried to get a supervisor to counsel appellant for being on her cellular phone in the screening area.

By decision dated November 13, 2006, the Office denied appellant's claim on the grounds that she did not establish an emotional condition in the performance of duty. It determined that she did not establish any compensable employment factors.

On December 13, 2006 appellant requested an oral hearing. After a preliminary review, by decision dated January 12, 2007, the hearing representative vacated the November 13, 2006 decision. The hearing representative remanded the case for the Office to refer appellant's statement to the employing establishment for review and comments.

¹ Appellant also submitted medical evidence in support of her claim.

On January 19, 2007 the Office requested that the employing establishment provide factual information regarding appellant's allegations. By decision dated March 13, 2007, it denied her claim after finding that she did not establish any compensable employment factors.

In a statement dated March 6, 2007, received by the Office on March 14, 2007, the employing establishment described appellant's job duties. It noted that she was suspended for 14 days on October 3, 2005 for a security breach. The employing establishment stated:

"The claimant also failed to acknowledge an inappropriate employee/supervisor relationship she was involved in which lead to the supervisor leaving the agency. Her acknowledgement of this relationship did not come until she wanted to resurrect her harassment claims against Supervisor Valentin, whom she felt was interested in her male friend.

"Mr. Beecroft, [f]ederal [s]ecurity [d]irector, was made aware of the situation in June 2006 and met with both the claimant and Supervisor Valentin as part of his investigation. The result was unfounded harassment. Shortly thereafter, the claimant desired mediation then withdrew her request. Mr. Beecroft acknowledged that the claimant had started to address her concern in a letter given to her screening manager, but neither the screening manager nor the claimant has a copy of the letter. [He] stated that he has spoken with the claimant many times over the past several years and at no time did she raise these concerns. It should be noted that the claimant's accusations were never brought forward to the Human Resources office between the initial claimed allegations in 2004 until June 2006."

On March 17, 2007 appellant requested an oral hearing. A hearing was held on July 16, 2007. Appellant related that Ms. Valentin alternated between friendliness and aggression. She grew fearful and stopped work in August 2006. Appellant was not friendly with Ms. Valentin outside of work, who had showed her pictures of friends and asked her to go with them for drinks. Ms. Valentin harassed appellant after she told her that she was not interested in women. She followed appellant around and made harassing telephone calls. The employing establishment ignored appellant's statements until she filed an EEO complaint, which was pending. Appellant asserted that Mr. Beecroft accepted Ms. Valentin's statement that she did not sexually harass appellant's without further investigation.

On August 13, 2007 appellant submitted numerous witness statements obtained in connection with her EEO complaint. On March 16, 2007 Harold Braden, a former supervisor with the employing establishment, stated:

"The first incident took place in and around 2004 when Ms. Valentin asked me to sit in on counseling with [appellant]. I had been the supervisor for the [morning] shift and Ms. Valentin was working the afternoon shift. I had stayed over to assist Ms. Valentin. I sat in on the meeting and witnessed Ms. Valentin berate [appellant] for a personal matter involving another employee. The other employee had said some derogatory remarks about [appellant] and [Ms. Valentin] was verbally assaulting her in regards to this matter. When she was finished I did

not quite understand the reasoning behind Ms. Valentin's counseling, but I had commended [appellant] before she left the meeting and told her [that] she was a hard worker and thanked her for doing a good job. After [appellant] left [Ms. Valentin] pointed her finger at me and said, 'Don't you ever compliment her when I am counseling her.' I thought the whole situation was strange and I just shook my head and walked out."

When Mr. Braden began working as an evening supervisor he witnessed Ms. Valentin following appellant around and trying to do her work.

On April 30, 2007 Nathan Lee, a coworker, related that appellant became upset when Ms. Valentin came to her workstation. He overheard Ms. Valentin say to appellant that "if [appellant] were a man [Ms. Valentin] would slap [her] in the ass." Ms. Valentin's comment surprised Mr. Lee. On May 7, 2007 Linda Camp, another coworker, related:

"I did on several occasions witness [Ms.] Valentin interact with [appellant]. It appeared that [Ms. Valentin] had a 'female to female' interest in [her]. [Appellant] was really bothered by this. I did witness days when [Ms. Valentin] would be aggressive, 'coming on to' [appellant] in a way that clearly showed she had an interest which was outside of work. It was not an employee to employee relationship."

Ms. Camp related that she did not hear appellant tell Ms. Valentin that she was not interested in her. She could tell, however, that Ms. Valentin "was determined to get even with [appellant] because [she] had spurned her, either by calling her out of work or belittling her." Ms. Camp related that during the spring and summer of 2004 and 2005 Ms. Valentin constantly came to the checkpoint where appellant worked. She did not visit the checkpoint otherwise. Ms. Camp indicated that Ms. Valentin did not need to go the checkpoint for supervisory duties but rather "made her visits intentional. She knew what day and time [appellant] was at the checkpoint. She would intentionally show up constantly throughout the day. I really think [Ms. Valentin] was taunting [appellant]." Around the summer of 2005, she witnessed Ms. Valentin tell appellant that if she were a man she "would slap [her] butt."

On May 2, 2007 Angela Hurt, a coworker, related that appellant told her that Ms. Valentin kissed her on the lips and would follow her in the bathroom and to restaurants. She did not witness the encounters but indicated that it was "not something that [appellant] just suddenly came up with. It had been ongoing over the years that we worked for [the employing establishment]." Ms. Hurt teased appellant about Ms. Valentin's actions. She related that Ms. Valentin would upset her and then "try to calm her down." A passenger grew upset when appellant tried to help him and Ms. Valentin insisted that the passenger write a formal complaint. Ms. Hurt indicated that she "was almost harassing the passenger to get him to write a formal complaint. The very next day [Ms. Valentin] followed [appellant] to the restaurant and sat down next to her, trying to be friendly. It was almost like she would try to provoke [her] and then look for the chan[c]e to calm her down. I do [not] know if it was a game [Ms. Valentin] was playing but it happened at lot."

On May 7, 2007 Anthony Hurse, II, a supervisor, witnessed Ms. Valentin “coming over to the checkpoint for nonbusiness[-]related things. As far as any touching or anything like that, I did [not] see anything.” Appellant told him that Ms. Valentin was harassing her. Mr. Hurse stated, “After that I did notice that Ms. Valentin would come over to the checkpoint where [appellant] was working an unusual amount of times for reasons that did [not] involve anything of a business nature.... I did sense that [Ms. Valentin] would come to the checkpoint for no reason.” Mr. Hurse related that appellant behaved professionally at work.

By decision dated September 20, 2007, the hearing representative affirmed the March 13, 2007 decision after finding that appellant had not established 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 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 her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees’ Compensation Act.² 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.³

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.⁴ A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.⁵ The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.⁶ The primary reason for requiring factual evidence from the claimant is support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.⁷

² 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁴ *See Michael Ewanichak*, 48 ECAB 364 (1997).

⁵ *See Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

⁶ *See James E. Norris*, 52 ECAB 93 (2000).

⁷ *Beverly R. Jones*, 55 ECAB 411 (2004).

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 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

ANALYSIS

Appellant attributed her emotional condition to harassment by Ms. Valentin, a supervisor. She asserted that Ms. Valentin repeatedly requested that she accompany her for drinks, showed her photographs of her friends, kissed her on the lips and stroked her forearm. Ms. Valentin became hostile when appellant declined her advances and criticized her work. She loitered by her workstation, followed her around, made sexual remarks and instigated disciplinary action.

Harassment and discrimination by supervisors and coworkers, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.¹⁰ A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.¹¹ In a statement dated July 13, 2006, Mr. Beecroft, the director of security with the employing establishment, acknowledged that appellant had complained about a supervisor in a letter two years ago and apologized for not addressing her concerns. On March 16, 2007 Mr. Braden, a former supervisor, related that he witnessed Ms. Valentin “berating [appellant] for a personal matter involving another employee. The other employee had said some derogatory remarks about [appellant] and [Ms. Valentin] was verbally assaulting her in regards to this matter.” Mr. Braden related that he did not understand the supervisor’s actions. He also witnessed Ms. Valentin following appellant around and attempting to perform her work. In a statement dated April 30, 2007, Mr. Lee, a coworker, overheard Ms. Valentin tell appellant that “if [appellant] were male [Ms. Valentin] would slap [appellant] in the ass.” Ms. Camp, a coworker, related that Ms. Valentin appeared to have a “female to female interest” in appellant. She maintained that the supervisor “would be aggressive, ‘coming on to’ [appellant] in a way that clearly showed she had an interest which was outside of work.” Ms. Camp witnessed Ms. Valentin belittling appellant and continually visiting her workstation. She heard Ms. Valentin tell appellant that if she were a man she “would slap [her] butt.” Ms. Hurt, a coworker, related that appellant told her that Ms. Valentin kissed her on the lips and followed her into bathrooms and restaurants. Ms. Valentin insisted that an upset passenger write a formal

⁸ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁹ *Id.*

¹⁰ *Doretha M. Belnavis*, 57 ECAB 311 (2006).

¹¹ *Robert Breeden*, 57 ECAB 622 (2006).

complaint against appellant. Mr. Hurse, a supervisor, witnessed Ms. Valentin coming to appellant's workstation for "an unusual amount of times for reasons that did [not] involve anything of a business nature." The witness statements submitted by appellant supported her allegations of harassment by Ms. Valentin. The Board finds that she has established a compensable employment factor. As appellant has established a compensable employment factor, the case presents a medical question regarding whether her emotional condition resulted from the compensable employment factor. The Office found there were no compensable employment factors and did not analyze or develop the medical evidence. The case will be remanded to the Office for this purpose.¹² After such further development as deemed necessary, the Office should issue a *de novo* decision on this matter.

CONCLUSION

The Board finds that appellant has established a compensable employment factor. The case is remanded to the Office for an evaluation of the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 20 and March 13, 2007 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 10, 2008
Washington, DC

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

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

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

¹² See *Robert Bartlett*, 51 ECAB 644 (2000).