

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUDY L. KAHN and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Anchorage, AK

*Docket No. 00-457; Submitted on the Record;
Issued February 1, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an emotional condition while in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for reconsideration.

On March 15, 1994 appellant, then a 43-year-old health systems specialist, filed an occupational disease claim (Form CA-2), alleging that she sustained acute stress and irritable bowel syndrome as a result of stress in her federal employment. She identified May 1, 1993 as the date she first realized her illness was caused or aggravated by her employment. Appellant stopped work on February 25, 1994.

Appellant submitted several statements describing incidents in which she alleged a pattern of harassment and reprisal at work. In May 1992 the employing establishment opened a new outpatient facility where she worked as an administrative assistant to the Chief of Staff, Dr. Elliott Boisen. The Director of the clinic was W. David Smith and appellant alleged that conflicts arose between the management styles and decisions made by Dr. Boisen and Mr. Smith. She alleged verbal abuse, harassment and retaliation following several investigations by the Western Regional Office of the employing establishment and the Office of Special Counsel.

After further development of the record, the Office denied appellant's claim by decision dated November 8, 1994. The Office found that she failed to establish that her claimed condition arose in the performance of duty. Appellant subsequently requested a review of the written record and, by decision dated December 18, 1995, an Office hearing representative affirmed the November 8, 1994 decision. Thereafter, she requested reconsideration on three occasions. In response, the Office twice reviewed appellant's claim on the merits and denied modification. The Office issued its most recent merit decision on October 7, 1998. Additionally, the Office denied appellant's third request for reconsideration by decision dated July 9, 1999. The Office explained that the evidence submitted in support of the May 18, 1999 request for reconsideration was immaterial and, therefore, did not warrant review of the prior decision. Appellant filed an appeal with the Board on October 5, 1999.

The Board finds that appellant failed to establish that her claimed conditions arose in the performance of duty.

In order to establish that she sustained an emotional condition causally related to factors of her federal employment, appellant must submit: (1) factual evidence identifying and establishing employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition or psychiatric disorder is causally related to compensable employment factors.¹ Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record.²

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless, does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable. Disability is not compensable, however, when it results from factors such as 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 Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.⁴

Appellant alleged that she was subjected to a pattern of harassment and retaliation because of her allegiance with the former Chief of Staff, Dr. Boisen. She noted that, in December 1992, he forwarded a promotion request on her behalf, which was denied by Mr. Smith.⁵ Appellant alleged that, in February 1993, Peter Courtnage, a clinical psychologist in charge of the addiction treatment program, was told to report directly to Mr. Smith's office, bypassing Dr. Boisen.⁶ Further, the Director allegedly made inquiries of appellant pertaining to the moving expenses of Mr. Courtnage, who had transferred from Boston in August 1992. Appellant contended that the matter of Mr. Courtnage's moving expenses had been closed, and that the Director's inquiries were made in order to trip her up and harass her.

Statements in the record from appellant, Mr. Courtnage and other employees reveal that several employees at the clinic sent letters of complaint about Mr. Smith and his management of

¹ See *Kathleen D. Walker*, 42 ECAB 603 (1991).

² *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

³ *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁵ Appellant also alleged that Mr. Smith improperly questioned Dr. Boisen about her use of compensatory time.

⁶ Mr. Courtnage noted that in November of 1992 he was asked by the Director to expand his administrative responsibilities to include helping develop and implement a homeless initiative. He indicated that he began to work more closely with Mr. Smith and his staff and became aware of their disdain for appellant and Dr. Boisen.

the clinic facility to the employing establishment's regional offices and to members of Congress. Appellant noted that, in May 1993, an inquiry was made by the Western Regional Office, after which she was harassed by Mr. Smith's staff following her interview with regional officials. A further inquiry of the outpatient facility was made in October 1993 by the employing establishment's Office of Special Counsel. Appellant alleged that, not long after her interview, she was verbally attacked and threatened by management staff.

In November 1993, Dr. Boisen transferred to an employing establishment facility in Seattle, Washington. Shortly thereafter, appellant came under the supervision of Dr. William Tellman, the Acting Chief of Staff and Bonnie L. Raymond, Chief of the Nursing Service. The record indicates that on November 5, 1993 appellant was offered a position as administrative assistant to the Chief of Human Resources at the employing establishment's facility in Portland, Oregon. She declined the transfer and alleged that she continued to be harassed and threatened.

In late November 1993, appellant was advised by Linda White, a coemployee, of an investigation concerning allegations that Mr. Courtnage had performed acupuncture treatment while on the premises of the Veterans Administration outpatient clinic. Appellant alleged that the inquiry was in retaliation and harassment for her friendship with Mr. Courtnage and Ms. White. Appellant represented Ms. White at the December 2, 1993 inquiry and was asked questions regarding her knowledge of any acupuncture treatments given by Mr. Courtnage to Ms. White. She alleged that the questions were totally inappropriate and violated her right to privacy and demonstrated Mr. Smith's intent to discredit, harass and intimidate her.⁷

In February 1994, a further inquiry was made by the Western Regional Office of complaints by staff of clinic management. Appellant alleged that on February 17, 1994 she was called into a meeting with Dr. Tellman and Ms. Raymond and accused of sending slanderous information and not cooperating as a team member of management. Appellant indicated that she worked four more days and then stopped work.

Appellant has alleged numerous incidents involving the Director and other members of his immediate staff as contributing to her claimed emotional condition. A majority of her allegations pertain to administrative and personnel matters. As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of the Federal Employees' Compensation Act.⁸ However, to the extent the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.⁹

Regarding her interaction with the Director, appellant had several meetings, both private and with other staff members present, wherein the Director allegedly questioned her about her working relationship with Dr. Boisen and also made comments about his competency and that of

⁷ A December 29, 1993 memorandum notes that, based on the testimony given, the investigation board was unable to substantiate the allegations. It was noted that Mr. Courtnage was licensed to perform acupuncture in the State of Alaska on non-Veterans Administration premises.

⁸ See *William Karl Hansen*, 49 ECAB 140 (1997).

⁹ *Id.*

other staff members. Appellant noted her discomfort over the subject matter and the conduct of these various meetings. However, the record contains statements from Judy Thompson, who began working under appellant in the Chief of Staff's office in December 1992. Ms. Thompson noted that appellant made no secret of the fact that she disliked Mr. Smith and his assistant, Susan Yeager and Dr. Boisen. Ms. Thompson related several incidents in which appellant yelled at Dr. Boisen in a loud voice that he was a terrible boss and told Ms. Thompson that she was going to "get rid" of the Director and Chief of Staff. Irene A. Kennedy, another employee under appellant's supervision, noted that appellant would speak to her of appellant's involvement in ongoing investigations being conducted of the outpatient clinic. Appellant often spoke of her disrespect for Mr. Smith and her hope that he would be removed from the clinic. Ms. Kennedy noted that, at that time, she was a new employee with no understanding of the history or reasons for the investigations. She stated that, during a period of six weeks in late 1993, she came to the conclusion that appellant's statements pertaining to the Director and his staffs were unfounded and she was treated in a professional manner. Ms. Kennedy commented that appellant did not appear to be under stress and "gave the appearance of enjoying the turmoil swirling through the office."

Appellant also identified three separate occasions in which she provided testimony concerning various issues that arose within the employing establishment. Appellant, however, was not the subject of any investigation. The Board has held that investigations that do not involve an employee's regularly or specially assigned duties are not considered to be employment factors. Such investigations are an administrative function of the employing establishment.¹⁰ Appellant's allegations pertain to harassment and retaliation by management following her involvement with the investigators.

Additionally, appellant identified incidents where she was transferred within the employing establishment, offered a lateral position outside the employing establishment and was excluded from participating in an employing establishment accreditation program. She also noted that the Director denied a request for a promotion submitted on her behalf. An employee's frustration from not being permitted to work in a particular environment or to hold a particular position is not compensable.¹¹ No evidence of error or abuse has been submitted with regard to the denial of appellant's promotion.

Appellant also took exception to two incidents regarding her use of leave. In one instance, the Director questioned appellant's use of compensatory time and in another instance she was initially placed on absence-without-leave status pending the submission of appropriate medical documentation supporting her disability for work. Although the handling of leave requests and attendance matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹² There is insufficient evidence to establish error or abuse on the part of the Director in discussing appellant's use of compensatory time with Dr. Boisen or in appellant's supervisor requesting additional medical documentation supporting her disability for work.

¹⁰ *Patricia A. English*, 49 ECAB 532, 537 (1998).

¹¹ *See Lillian Cutler*, *supra* note 3.

¹² *Dinna M. Ramirez*, 48 ECAB 308, 313 (1997).

Appellant has not demonstrated that the employing establishment either erred or acted abusively in discharging its duties with respect to the above-noted incidents involving personnel or administrative matters.¹³

Appellant also alleged that she was subjected to verbal abuse and harassment on at least three occasions. The Board has held that, while verbal abuse may constitute a compensable factor of employment, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.¹⁴ Additionally, the Board has held that for harassment to give rise to a compensable disability there must be evidence that harassment did, in fact, occur. A claimant's mere perception of harassment is not compensable.¹⁵ The allegations of harassment must be substantiated by reliable and probative evidence.¹⁶

The first instance of verbal abuse allegedly occurred on September 29, 1993. Appellant stated that the Ms. Yeager, staff assistant to the Director, approached her about an e-mail appellant sent to Mr. Courtnage regarding payroll procedures.¹⁷ According to appellant, "Ms. Yeager was visibly angry and shaking" as she yelled at her in front of two other employees. She allegedly told appellant that she "should be certain of [her] facts before [she] comment[ed] on anything." Ms. Yeager also purportedly stated she was "'pissed off" and was n[o]t going to take this 'shit' anymore." Appellant stated that Ms. Yeager expressed concern about the possibility that the effected employee would file a grievance against her.

Ms. White provided a February 28, 1994 statement, wherein she stated she witnessed "Ms. Yeager yelling in the doorway of [appellant's] office that she was tired of this shit going on..." She also stated that Ms. Yeager "viciously yelled at [appellant], shook and was very irate."¹⁸

In a statement dated September 1, 1994, Ms. Yeager acknowledged that she spoke with appellant regarding the September 1993 e-mail, but denied having expressed any concern about the effected employee possibly filing a grievance against her. She explained that the normal procedure was to make a promotion effective at the beginning of a pay period and Mr. Courtnage was demanding his raise to a GS-12 be manually coded into the payroll system during the middle of a work week. Ms. Yeager stated that appellant was involving herself in an administrative matter and in the process, had misquoted one of Ms. Yeager's subordinates. She further stated

¹³ *Ruthie M. Evans, supra* note 4.

¹⁴ *Leroy Thomas, III*, 46 ECAB 946, 954 (1995).

¹⁵ *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

¹⁶ *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991).

¹⁷ Mr. Courtnage sought to have his promotion to a GS-12 implemented during the middle of a pay period. Appellant advised him that a manual input could be made. Mr. Courtnage was advised by Ms. Yeager to follow proper administrative channel's regarding his request. She confirmed with personnel specialists that pay raises were made effective the following pay period.

¹⁸ Ms. White provided another statement dated April 5, 1996. Although in this latter statement Ms. White did not attribute any particular remarks to Ms. Yeager, she characterized Ms. Yeager's demeanor as "extremely hostile, loud, shaking and very unprofessional."

that she informed appellant of the proper procedure for implementing a pay raise and advised her that she could not allow her to involve her employees in inappropriate e-mails. While Ms. Yeager did not specifically address the vulgarity attributed to her, she denied that she was “vicious, shaking or irate.” She further stated that she maintained a professional relationship with appellant.

There is a dispute as to Ms. Yeager’s demeanor and her alleged use of a common vulgarity on September 29, 1993. Even accepting that Ms. Yeager raised her voice with appellant, the Board finds that this incident does not rise to the level of compensable verbal abuse. Ms. Yeager purportedly told appellant she was “pissed off” and was n[o]t going to take this “shit” anymore. Ms. Yeager is accused of using a common vulgarity, which is mildly offensive at best. Although Ms. White characterized Ms. Yeager as being “vicious,” she did not otherwise describe what might be considered vicious behavior. While appellant may have been disturbed by Ms. Yeager’s remarks on September 29, 1993, not every ostensibly offensive statement uttered in the workplace will give rise to coverage under the Act.¹⁹

Appellant also accused Ms. Yeager of verbally attacking her on January 5, 1994. She described a conversation regarding personal telephone calls appellant had made to Chuck Walsh, a former technology employee who had transferred to Seattle. Appellant stated that Ms. Yeager accused her in a “very, very, angry, verbally abusive threatening tone” of talking to another employee about his moving expenses and “trying to cause trouble.” She further stated that Ms. Yeager “implied with her intense anger, body shaking and threatening style” that disciplinary action would be taken. Ms. Yeager responded that she was at a monthly staff meeting when informed by the Chief of Technology Support, Rus Pittman, that he had received a telephone call from Mr. Walsh, in which he informed Mr. Pittman that appellant had called him in Seattle to “stir the pot” at Anchorage.²⁰ Mr. Yeager stated that she went to appellant’s office with Mr. Pittman and was informed by appellant that her telephone calls to Mr. Walsh were for personal reasons. Ms. Yeager stated that Mr. Pittman cautioned appellant about making personal telephone calls on the FTS line from work. Ms. Yeager stated that she informed appellant’s supervisor, Ms. Raymond, about the situation and they returned to appellant’s office.

In a statement dated August 23, 1994, Ms. Raymond indicated that Ms. Yeager did not verbally attack appellant. She further stated that she and Ms. Yeager informed appellant that she had no business with Mr. Walsh and should not be using the FTS lines for personal calls. Appellant admitted the telephone calls to Mr. Walsh were for personal reasons and Ms. Yeager stated she left the office while Ms. Raymond was still speaking with appellant.

Appellant has not established that she was subjected to verbal abuse on January 5, 1994. She stated Ms. Yeager spoke to her in a “very, very, angry, verbally abusive threatening tone” and “implied with her intense anger, body shaking and threatening style” that disciplinary action would be taken. Appellant’s characterization of Ms. Yeager’s demeanor and tone is purely subjective. Ms. Yeager’s alleged “verbally abusive threatening tone” cannot be gleaned from

¹⁹ *Leroy Thomas, III, supra* note 14.

²⁰ Mr. Pittman submitted a statement, noting that he had inquired whether appellant had any engineering issues from the time Mr. Walsh worked in Anchorage. Mr. Walsh informed him that appellant telephoned several times for personal business and was “stirring the pot” for some issues she was reporting.

appellant's account of the incident. Moreover, Ms. Raymond stated that Ms. Yeager did not verbally attack appellant on January 5, 1994.

The third allegation of verbal abuse and harassment occurred over a two-day period in February 1994. Appellant alleged that Ms. Raymond confronted her on February 7, 1994 and accused her of publicly disclosing an internal memorandum Ms. Raymond had written regarding the Director's removal of another employee. She described Ms. Raymond as "shaking and visibly angry." Appellant also stated that Ms. Raymond was harassing, loud, abusive and hostile. Ms. Raymond allegedly accused appellant of trying to discredit her and told appellant that her actions "would come back to haunt [her]."

The following day appellant attended a meeting with Dr. Tellman, Ms. Raymond and Ms. White. During this meeting the issue of appellant's alleged disclosure of Ms. Raymond's memorandum was addressed. Dr. Tellman produced a copy of the May 12, 1993 memorandum for appellant and Ms. White to review. Appellant stated that neither she nor Ms. White responded. Ms. Raymond allegedly began yelling at appellant and stated, "[I] know I gave that memo[ramum] to you a year ago when you asked me to write it down." Ms. Raymond also allegedly stated, "[I] [a]m furious and you're going to pay for it" and "I [a]m contacting an attorney tomorrow." When asked to respond to the allegations, appellant stated that she had no comment. Ms. Raymond purportedly responded "[y]ou better say that."

In her August 23, 1994 statement, Ms. Raymond acknowledged that she became angry with appellant on February 7, 1994. She explained that the internal memorandum she had given appellant in May 1993 was not intended for public disclosure, yet copies had been anonymously faxed to the Director and several Alaska congressional representatives. Ms. Raymond suspected that appellant was responsible for the disclosure because she had given the memorandum only to appellant. While Ms. Raymond acknowledged that she was angry with appellant, she denied screaming at her or threatening her on February 7, 1994. However, Ms. Raymond did not comment on the February 8, 1994 incident in Dr. Tellman's office.

Ms. White was present at both the February 7 and 8, 1994 incidents and her statements essentially corroborate appellant's allegations.

The Board finds that the incidents of February 7 and 8, 1994 involving appellant and Ms. Raymond do not constitute verbal abuse. Ms. Raymond denied that she screamed at appellant or threatened her on February 7, 1994, but admitted that she was angry about the public disclosure of her memorandum. She described the disclosure as a "ploy" by appellant to cause trouble and disrupt her working relationship with the management staff. Appellant did not deny Ms. Raymond's allegations on either February 7 or 8, 1994 that she had disclosed an internal memorandum. The Board finds that Ms. Raymond's accusations and the accompanying threat of legal recourse do not constitute verbal abuse. The fact that Ms. Raymond was angry and raised her voice does not support a finding that she verbally abused appellant on either February 7 or 8, 1994.

A review of appellant's other allegations and statements from witnesses reveal appellant's primary frustration was not related to the performance of her regular or specially assigned duties, but rather to her frustration with Dr. Smith and others pertaining to the performance of supervisory functions. An employee's complaints concerning the manner in

which a supervisor performs his or her duties as a supervisor or the manner in which a supervisor exercises his or her supervisory discretion fall, as a rule, outside the scope of coverage of the Act.²¹ This principle recognizes that a supervisor or manager, in general, must be allowed to perform their duties, that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be compensable absent evidence of error or abuse.²² In the instant case, appellant has not submitted sufficient evidence of error or abuse to substantiate that her supervisors or other managers acted unreasonably in the performance of their duties.

As appellant has failed to substantiate a compensable employment factor as a cause of her claimed conditions, the Office properly denied appellant's claim.

The Board finds that the Office properly exercised its discretion in refusing to reopen appellant's case for merit review.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.²³ Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.²⁴

Appellant's May 18, 1999 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above noted requirements under section 10.606(b)(2). With respect to the third requirement, submitting

²¹ *Christophe Jolicoeur*, 49 ECAB 553 (1998); *Abe E. Scott*, 45 ECAB 164 (1993).

²² *Id.*

²³ 20 C.F.R. § 10.606(b)(2) (1999).

²⁴ 20 C.F.R. § 10.608(b) (1999).

relevant and pertinent new evidence not previously considered by the Office, appellant submitted recent witness statements from Linda White, Richard T. Esposito and Keith M. Jones.²⁵ Two of the statements, however, pertain to an incident of alleged harassment that occurred February 20, 1997; some three years after appellant filed her claim. Inasmuch as the November 20, 1998 statement from Mr. Jones and the July 20, 1997 statement from Mr. Esposito are not relevant to the issue on reconsideration, the Office properly declined to reopen appellant's claim based upon this newly submitted evidence.²⁶ Ms. White's December 7, 1998 statement is similarly insufficient to warrant reopening appellant's claim, as it is essentially a reaffirmation of her statements of record. Accordingly, Ms. White's most recent statement is cumulative in nature and, therefore, is insufficient to warrant reopening the claim.²⁷ Consequently, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office did not abuse its discretion in denying appellant's May 18, 1999 request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated July 9, 1999 and October 7, 1998 are hereby affirmed.

Dated, Washington, DC
February 1, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

²⁵ Additionally, appellant resubmitted three personal statements dated September 29, 1993, February 7, 1994 and February 8, 1994, as well as a prior statement from Ms. White dated February 28, 1994. As this evidence was already part of the record, its resubmission does not provide a basis for reopening the claim. *James A. England*, 47 ECAB 115, 119 (1995).

²⁶ Evidence that does not address the particular issue involved does not constitute a basis for reopening the claim. *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

²⁷ Evidence that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening the claim. *James A. England*, *supra* note 21; *Sandra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).