

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

CELA TECAMACHALTZI DE ILLAS, Appellant)	
)	
and)	Docket No. 04-2153
)	Issued: August 12, 2005
)	
DEPARTMENT OF DEFENSE, AGUADILA, PR, Employer)	
)	
)	

Appearances:
Cela Tecamachaltzi de Illas, pro se,
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 24, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative's decision dated June 7, 2004, which denied her emotional condition claim. Appellant also timely appealed the March 25, 2004 decision, which denied her request for a subpoena. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues on appeal are: (1) whether appellant has met her burden of proof to establish that she sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied appellant's request for a subpoena.

FACTUAL HISTORY

On December 10, 2001 appellant, then a 39-year-old education technician, filed a traumatic injury claim alleging that her anxiety and high blood pressure were caused by sexual

harassment from a student named Abdiel Machado on December 6, 2001. The employing establishment controverted the claim and indicated that Abdiel Machado had denied the allegations. Appellant stopped work on December 7, 2001. On a December 17, 2001 appellant indicated that Abdiel Machado verbally asked her “[L]ady how much?” She advised that this occurred in the school cafeteria and she interpreted this to mean “how much is charged by one for sexual favors.” Appellant also alleged that she was sexually harassed during the previous school year and that, although she notified the employing establishment, she did not know the outcome of any investigation nor was she notified of any corrective actions. She sought medical treatment and was diagnosed with depression and panic syndrome. Appellant submitted a December 10, 2001 emergency room report and treatment notes from Dr. Luis A. Aponte, a Board-certified surgeon.

In a letter dated December 19, 2001, Pedro J. Lopez, the father of Machado, filed a complaint alleging that appellant was harassing his son by making complaints of harassment against him. At the time of the alleged harassment, his son was asking another student about the cost of ice cream and was not talking to appellant. Mr. Lopez explained that his son was a special education student who was receiving treatment and on medication. He also alleged that his son was told to stay away from the fifth grade by a security officer where appellant had a daughter.

In a December 13, 2001 memorandum, Lauren Stepaniak, the assistant principal, noted that she investigated the December 5, 2001 incident. She determined that Abdiel Machado was speaking to Rosemary Morales, a student, and asking her how much money she had in her cafeteria account in order to buy him ice cream.¹

In a letter dated January 9, 2002, the Office advised appellant to submit additional evidence. A separate letter of the same date was sent to Dr. Aponte.

In a statement dated January 15, 2002, Rosemary Morales, a student, indicated that it was possible that on December 6, 2001 Abdiel Machado asked her how much money she had in her cafeteria account to see if she could purchase additional food, such as ice cream, for him. Rosemary Morales indicated that she did not specifically remember this question on this particular day but noted that it was possible because he had asked her this question many times before. She also indicated that he frequently asked other students as well.

In a January 15, 2002 letter addressed to the employing establishment, appellant requested documentation regarding her sexual harassment claim of December 6, 2001 and regarding a sexual harassment report in November 2000 or January 2001. She also informed Dr. Joan Campbell, the principal at the employing establishment, that she had received a response from Esther Yovovich, a human resources manager, regarding a possible separation or reduction-in-force but that she no longer had questions about this. Appellant requested an explanation as to why she was only authorized a 5-minute break, while the other education technicians were authorized a 10-minute break.

¹ The Office subsequently received copies of her notes, which included a solution of reminding the student that perceptions are important and that he should be careful in what he said, as others might misinterpret him.

In a January 23, 2002 response, Dr. Campbell explained that she informed appellant that the assistant principal had made an error in her break schedule. However, Dr. Campbell advised appellant that, if she had been informed earlier, a correction would have been made. She also discussed appellant's concerns from the previous school year regarding two students whom she alleged were disrespectful. Dr. Campbell indicated that the boys, Phillip Donnelly and Christopher Velasquez, were questioned in appellant's presence and denied wrongdoing. They were suspended from school for inappropriate and disrespectful behavior. She explained that the behavior was not found to be sexual harassment. Dr. Campbell also noted that the two other boys, Craig Alley and Joaquin Colondres, were not identified as treating appellant inappropriately.

In a January 29, 2002 letter, appellant repeated her allegations concerning the December 6, 2001 incident. She alleged that the student was suspended for two days but that the school refused to provide her written documentation concerning the incident. Appellant also alleged that she was sexually harassed in the prior school year, as well as a second incident on January 28, 2002, which she indicated occurred while she was dropping off her daughter.² She also alleged that Dr. Campbell tried to illegally terminate her. In a January 28, 2002 discipline referral, Ms. Stepaniak determined that appellant was leaving a fifth grade classroom when the alleged incident occurred and that Mr. Ortiz, a witness, indicated that the student said nothing to appellant. She found no evidence of sexual harassment.

On February 20, 2002 the Office received an informal Equal Employment Opportunity (EEO) complaint filed by appellant regarding the December 6, 2001 incident.

By letter dated February 25, 2002, the Office requested that the employing establishment provide information concerning appellant's allegations of sexual harassment.

In a February 28, 2002 response, Dr. Campbell advised that Abdiel Machado was not suspended because the investigation did not reveal any intent to harass appellant. Dr. Campbell denied that she illegally sought to terminate appellant. She explained that appellant was originally in a temporary position and that she was not aware that appellant's status had changed. Dr. Campbell explained that, once she was advised that appellant's position was made permanent, she contacted appellant and informed her. In a March 14, 2002 letter, Dr. Campbell explained that an investigation was conducted, including interviewing the student and a witness, and it was determined that there was no basis to support appellant's allegation of sexual harassment. Dr. Campbell explained that appellant was hired at the beginning of the school year as a dedicated special education technician responsible for one particular student. She stated that these positions came with one student and were not continued from year to year unless the student returned. Dr. Campbell informed appellant that, as her student was graduating at the end of the year, she should apply for a permanent position. Dr. Campbell explained that appellant did not express any concerns at that time, but chose to discuss them with the human resources

² She enclosed a January 28, 2002 letter addressed to Dr. Campbell in which she described an incident regarding Abdiel Machado that occurred that day. She explained that she was coming from the fifth grade classroom and Abdiel Machado approached her and stated, "[h]ow much lady?" She alleged that he laughed at her in an "intimidating and sarcastic manner." Appellant related that she immediately notified the employing establishment and advised that Jose Ortiz, a janitor, witnessed the event.

office. Dr. Campbell explained that she was later advised that appellant's position had been converted to a permanent position. Dr. Campbell indicated that, after she learned of this, she informed appellant that her position was a permanent position and that she would be eligible to return.

In an April 4, 2002 decision, the Office found that the evidence was insufficient to establish that appellant sustained an emotional condition in the performance of duty. The Office adjudicated the claim as an occupational disease claim.³ Appellant subsequently requested a hearing.

In a May 14, 2002 statement, appellant alleged that the employing establishment created a hostile working environment by having illegal meetings on May 30, 2000 and June 4, 2001 and advising that she would be separated. She stated that no union representatives were invited to these meetings, that the employing establishment did not provide her with written documentation of the alleged incidents, that she disagreed with the school's discipline of the students whom she alleged sexually harassed her. Appellant stated that she was questioned about her arrival time at work, given shorter breaks and her locker was opened without her permission.

In a June 11, 2002 statement, Ms. Stepaniak noted that appellant's duties included supervising students as they arrived at school and at lunch in the cafeteria. Ms. Stepaniak indicated that, on December 6, 2001, appellant informed her that she thought a student was talking to her when she heard the student say "cuanto." Ms. Stepaniak stated that she spoke with the student the next time he was at school and he remembered saying the word but explained that it was directed to another student regarding how much money was in her lunch account. He explained that he wanted her to purchase ice cream for him. Ms. Stepaniak indicated that she explained that he should be careful about what he said and how he said it. She also noted that the other student confirmed what had occurred. The assistant principal stated that no action was taken as the student was not directing any comments to appellant.

By letter dated June 11, 2002, appellant requested subpoenas for numerous witnesses and documents.

By decision dated March 25, 2004, the Office hearing representative denied appellant's subpoena request on the grounds that she did not provide a valid reason for the request.

A hearing was held on April 15, 2004. After the hearing, appellant submitted various documents, some of which were previously of record. In a September 10, 2003 Merit Systems Protection Board Settlement (MSPB) settlement agreement it was found that the employing establishment withdrew appellant's termination, effective July 7, 2003, for excessive absenteeism and reinstated her pending her voluntary retirement or resignation from the

³ Appellant subsequently filed a claim for an occupation disease, again identifying the December 6, 2001, incident and reiterating her contentions regarding the employing establishment.

employing establishment.⁴ Appellant submitted a February 26, 2003 letter to the employing establishment regarding Dr. Campbell's action on her leave requests. She enclosed a March 7, 2001 memorandum from Dr. Campbell regarding her duty time. Appellant alleged that these were examples of harassment and a hostile environment. In a June 4, 2003 statement, appellant reiterated repeated her allegations. She related that she was offended by the word "cuanto" because it was used "in a sexual context" and implied that she was "a prostitute." Appellant asserted that the incidents should have been treated as sexual harassment and that school policies were not properly followed. She also alleged harassment and a hostile environment as the employing establishment removed her locker and prevented her from returning to work.

The Office also received several EEO interview forms. On May 15, 2002 Dr. Joseph Pluto, a teacher, was interviewed about appellant's allegations of sexual harassment. He indicated that he did not have direct knowledge of the alleged incidents. On May 15, 2002 Carmen Fonseca advised that she was in the cafeteria when she heard some students make the comment "cuanto" and that appellant reacted to those comments. She advised that appellant told her about the incident and was fearful to report it. Ms. Fonseca also indicated that she was not familiar with the sexual harassment incident. On May 15, 2002 Kathy Hall, a teacher, did not recall the students but advised that she heard various students say "[h]ow much." On May 16, 2002 Harry Hamilton, a teacher, advised that he was not present during the alleged incident.

A statement was also received from Dr. Campbell in conjunction with the EEO investigation. She explained that the two separate meetings regarding appellant's position were held due to the fact that, when appellant was first hired, she was in a dedicated position. Dr. Campbell explained that this meant that her position could not exceed two years. As appellant was hired in 1999, Dr. Campbell met with her to advise her regarding the term. She indicated that appellant was made permanent without her knowledge and, before she was informed, the second meeting was held. Once she was informed that the position was permanent, Dr. Campbell no longer advised appellant regarding this time frame. In another statement, Dr. Campbell also discussed the actions taken regarding appellant's complaints of sexual harassment. An investigation was conducted with the two students identified by appellant and a meeting was held with them and their parents regarding an incident in which the students used the word "cuanto" in early 2001. It was determined that these students were not using the words in any sexual connotation; however, they were suspended for disobeying an adult. She further noted that one boy had an out of school suspension for using profanity.

In a January 29, 2001 letter directed to the parent of Phillip Donnelly, Dr. Campbell discussed his suspension and noted that, when questioned, the student responded with a vulgarity as he was leaving the office. The suspension noted that the student was suspended for disrespect and use of vulgarity. In a separate letter dated January 29, 2001, addressed to the parents of Christopher Velasquez, the principal advised that the student was receiving an out of school

⁴ The employing establishment agreed to reinstate appellant to her former position in a leave without pay status and expunge all documents related to her removal from her file. Appellant agreed to apply for disability retirement and voluntarily resign if it was not approved. She also agreed to withdraw her MSPB appeal. This settlement agreement made no findings of improper action by either party. Associated with the settlement were documents pertaining to the removal and the EEO process.

suspension for harassing one of the school's education technicians for an incident on December 15, 2000.

In an undated memorandum, Ms. Stepaniak noted that, sometime in 2000 and 2001, there was an incident involving boys who admitted during the meeting to saying "Cuanto, cuanto" to appellant because they enjoyed getting her angry. She explained that the incident was handled as disrespect towards a school employee and that the students were questioned and suspended. Ms. Stepaniak denied that appellant was subjected to harassment or a hostile work environment.

In a separate statement, Ms. Hall indicated that a student began saying the Spanish word "cuanto" loudly after school, where appellant had bus duty. She indicated that she was accustomed to his loud outbursts and he did not appear to be saying this to anyone in particular. Ms. Hall noted that appellant became offended and indicated that she felt that he was asking her "how much" as if she were a prostitute. Ms. Hall indicated that, when appellant started to show annoyance, this was "like adding fuel to a fire" and the student continued to say "cuanto." She stated that when appellant reported him, he stopped and his family soon moved from Puerto Rico. Ms. Hall indicated that another student, Abdiel Machado, decided that appellant's reaction was too good to miss and started saying the same word to her. She could not recall specific dates or witnesses.

In a May 3, 2003 statement, Ms. Hall discussed a open locker incident noting that the supply clerk needed a locker for a new employee. She advised that after the clerk opened these unidentified lockers she saw clothing articles that appeared to belong to appellant.

The Office also received a May 6, 2003 statement from Maria Rosa, an office clerk, who indicated that she cut the locks off of two lockers as they could not identify who one belonged to and the other belonged to an employee that had left. She stated that appellant had another locker identified with a photograph of her dog. Ms. Rosa advised that she was not aware until after she cut off the lock that the articles of clothes in the locker were appellants'.

A statement from Mr. Ortiz indicated that on January 28, 2002 he observed the student Abdiel Machado make a loud sarcastic laugh as he walked by appellant.

In an April 19, 2004 statement, appellant indicated that, at the time of the December 6, 2001 incident, the student was sitting having lunch at a table in the cafeteria. She alleged that he was standing about 8 to 10 feet away when he looked at her and stated "Cuanto, cuanto?" Appellant alleged that, in the school environment, this comment had the additional meaning of how much for prostitution services.

By decision dated June 7, 2004, the Office hearing representative affirmed the April 4, 2002 decision, as modified. The Office hearing representative found that appellant had established a compensable work factor with regard to the meeting between appellant and the principal advising her that she would not be tenured, as it was based on error by the principal that appellant was a temporary employee. Additionally, the Office hearing representative found that the discipline of the two students for being disrespectful to appellant by saying "cuanto" was a compensable factor. However, the Office hearing representative determined that appellant had

not submitted sufficient medical evidence to establish that her condition was causally related to work factors.

LEGAL PRECEDENT -- ISSUE 1

Workers' compensation law does not apply to each and every 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 disability results from an employee's emotional reaction to her regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.⁵ 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.⁶

Appellant 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 employment factors.⁷ This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions, for which compensation is claimed.⁸

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 the 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 the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹⁰

⁵ 5 U.S.C. §§ 8101-8193.

⁶ See *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 126 (1976).

⁷ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁸ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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

¹⁰ *Id.*

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must, thus, initially review whether the alleged incidents and conditions of employment are compensable under the terms of the Act.

Certain of appellant's allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.¹¹ These include allegations about the employing establishment's investigation of her sexual harassment claim; her supervisor's alleged attempt to separate her; appellant's supervisor questioning her regarding her arrival time, about her break, about her performance evaluation; allegations about appellant's locker being opened and her belongings removed; charges that her workers' compensation claim was obstructed; a request that she provide medical documentation to return to work and her removal from her position for absenteeism. However, 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.¹²

Regarding the handling of her claim and the subsequent investigations, the employing establishment denied any error or abuse. Investigations are considered an administrative function of the employing establishment and are not considered to be employment factors.¹³ Dr. Campbell discussed the actions taken regarding appellant's complaints of sexual harassment and indicated that investigations found that these students were not using the word "cuanto" with a sexual connotation although they were suspended for disobeying an adult. She further noted that one boy had an out of school suspension for using vulgarity after she counseled him. Although appellant alleged that the employing establishment engaged in harassment, she did not provide sufficient evidence to support her allegations that the actions of the employing establishment or the investigations into her complaints were unreasonable. The Board has held that mere disagreement or dislike of a supervisory or management action will not be compensable without a showing through supporting evidence that the incidents or actions complained of were unreasonable.¹⁴ Appellant has not established a compensable employment factor under the Act with respect to the investigation related matters.

Regarding her allegation that the principal tried to illegally separate her on two occasions without representation, Dr. Campbell explained that the two separate meetings regarding

¹¹ An employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. *Sandra Davis*, 50 ECAB 450 (1999); *see also Barbara J. Latham*, 53 ECAB 316 (2002) (the assignment of work is an administrative function and the manner in which a supervisor exercises his or her discretion falls outside the ambit of the Act).

¹² *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹³ *Ana D. Pizarro*, 54 ECAB ____ (Docket No. 02-1036, issued February 27, 2003).

¹⁴ *Judy L. Kahn*, 53 ECAB 321 (2002).

appellant's position were due to the fact that, when appellant was first hired, she was in a position that could not exceed two years and she met with her to discuss this term. Dr. Campbell indicated that appellant was subsequently made permanent without her knowledge and before she was informed, the second meeting was held. Once she was aware that appellant was in a permanent position, she no longer advised appellant regarding the time frame of her tenure. The record reflects that the first meeting was held in 2000 and the second one was held in 2001. In a letter dated January 15, 2002, appellant informed Dr. Campbell that she had received a response from Ms. Yovovich, a human resources manager, regarding her status and that her questions were answered. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁵ The Board finds that the principal's explanation regarding the meetings was reasonable and, in light of appellant's indication that her questions about the matter were answered, does not constitute evidence of error or abuse. When the principal was advised that appellant had been made a permanent employee, she no longer attempted to advise appellant regarding her tenure. Therefore, the Board finds that appellant has not established a compensable factor with regard to these meetings on her employment status.

Appellant alleged error in her break schedule, indicating that her break was 5 minutes instead of 10 minutes. By letter dated January 23, 2002, the principal noted that a typographical error occurred in the published schedule, which resulted in appellant's break time being five minutes short. She advised that, when the error was brought to her attention, it was corrected and that she volunteered to pay appellant for any extra time worked. The Board finds that this was not error. The time schedule was corrected as soon as the employing establishment was informed of the situation and it offered to compensate appellant for the five-minute difference. There is no other evidence that the employing establishment personnel acted unreasonably. The Board finds that appellant has failed to establish error or abuse in the employing establishment's handling of this administrative matter.

Regarding the matters pertaining to appellant's arrival time,¹⁶ performance evaluations,¹⁷ her workers' compensation claim¹⁸ and her removal due to absenteeism,¹⁹ appellant has not submitted any evidence or arguments to suggest that the letters or evaluations were in error. An employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and

¹⁵ *Bonnie Goodman*, 50 ECAB 139 (1998); *John Polito*, 50 ECAB 347 (1999).

¹⁶ Although the handling of leave requests and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee. *See John Polito*, *supra* note 15.

¹⁷ *See Brian H. Derrick*, 51 ECAB 417 (2000).

¹⁸ *See Robert W. Johns*, 51 ECAB 137 (1999).

¹⁹ Administrative and personnel matters include matters involving the training or discipline of employees are generally not compensable. *James E. Norris*, 52 ECAB 93 (2000).

requirements of the employer and do not bear a direct relation to the work required of the employee.²⁰

As to appellant's allegations concerning her locker, the employing establishment confirmed that the locker was opened to provide space for a new employee and denied that it was for any other purpose. The decision on allocating storage space to employees is an administrative matter and, as noted above, an employee's emotional reaction to administrative actions or personnel matters is generally not covered under the Act. The evidence indicated that the locker in question had no outside identification and the employing establishment made reasonable efforts to ascertain the user prior to removing the lock. Appellant did not submit any evidence to suggest that it was opened for any other reason or that the employing establishment opened it contrary to any employer policies. The Board finds that appellant has not submitted any evidence to establish a compensable factor in this regard.

Regarding appellant's allegations that the employing establishment wrongly denied leave, this, as noted above, is related to administrative or personnel matters and is unrelated to her regular or specially assigned work duties. Appellant did not submit any evidence supporting her claims that the employing establishment committed error or abuse regarding denial of leave.²¹

The Board notes that appellant also made allegations of harassment and a hostile work environment. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.²² 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.²³

With regard to appellant's sexual harassment claims, she alleged that a student, Abdiel Machado, asked her on December 6, 2001 and again on January 28, 2002, "cuanto" or "how much?" She alleged that she interpreted this to mean "how much is charged by one for sexual favors." Appellant alleged that the first instance occurred in the school cafeteria and the second one occurred as she was dropping off her daughter in her fifth grade classroom. The employing establishment investigated the allegations and advised that, in the first instance, he was asking a fellow student for ice cream money. Ms. Stepaniak, the assistant principal, concluded that, regarding the first incident, Abdiel Machado was speaking to Rosemary Morales, a student, regarding how much money she had in her cafeteria account, so she could buy him ice cream. This was also corroborated by Rosemary Morales, a student, in a January 15, 2002 statement. She confirmed that he often asked her how much money she had and to see if she would buy him ice cream. The employing establishment indicated that Abdiel Machado was not

²⁰ *Sandra Davis*, 50 ECAB 450 (1999).

²¹ *See John Polito*, *supra* note 15.

²² *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

²³ *See Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

suspended because the investigation did not reveal any intent to harass appellant. This evidence is not sufficient to support appellant's allegations of harassment. Regarding the January 28, 2002 incident, the employing establishment received a witness statement from Mr. Ortiz, the janitor, who advised that the student did not say anything to appellant. While appellant apparently perceived that his laughter was directed towards her, mere perceptions of harassment or discrimination are not compensable. There is no evidence supporting appellant's perception of harassment with regard to either of these incidents. Additionally, appellant was not in the performance of duty on January 28, 2002 but was dropping her child off at school and not performing her duties. The Board finds that she has not established a compensable factor with respect to these allegations.

The employing establishment also discussed concerns regarding two students whom she alleged sexually harassed her during the previous year. Dr. Campbell indicated that two boys, Phillip Donnelly and Christopher Velasquez, were questioned in appellant's presence and, although they denied harassment of appellant, they were suspended for inappropriate and disrespectful behavior. She explained that the behavior was not determined to be sexual harassment. Ms. Hall, a coworker, indicated that a Caucasian student began saying the Spanish word "cuanto" loudly after school and that he did not appear to be saying this to anyone in particular. She noted that appellant took this as a personal offense and indicated that she felt that he was asking her "how much." Ms. Hall stated that when appellant reported him, he stopped and his family soon moved from Puerto Rico. She indicated that Abdiel Machado, decided that appellant's reaction was too good to miss and started saying the same word to her. However, she could not recall any specific dates or witnesses. Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.²⁴ While the evidence shows that students may have occasionally behaved inappropriately, the evidence does not support harassment directed towards appellant. The actions have not been shown to rise beyond her own perception of harassment or verbal abuse. Instead, the evidence tends to indicate that the nature of interactions with children were of the type one might expect in a school setting for someone in appellant's position and that appellant's reaction to their behavior is self-generated in nature. The Board finds that, under these circumstances, appellant has not established a compensable employment factor with regard to her claim of being sexually harassed when students stated "cuanto."

Although appellant alleged generally that the principal harassed her, she has not provided specific allegations, such as witness statements, to establish that specific statements or actions occurred regarding the claim of harassment. Furthermore, the employing establishment denied that appellant was subjected to harassment or discrimination of any kind.

Although appellant sought redress from the Equal Employment Opportunity Commission, she produced no final decision or finding by that body that would lend support to her charges of harassment, retaliation, discrimination or any error or abuse pertaining to administrative or personnel matters.

²⁴ See *Bonnie Goodman*, *supra* note 15.

As appellant has not established a compensable employment factor, it is not necessary to address the medical evidence.²⁵

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.²⁶ The implementing regulation provides:

“A claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative. The hearing representative may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.”²⁷

ANALYSIS -- ISSUE 2

As noted above, the Office has the discretion to grant or reject requests for subpoenas. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.²⁸

By letter dated June 11, 2002, appellant requested that the Office issue subpoenas to several witnesses. Appellant, however, did not provide a compelling reason for the request. In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena “is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.”²⁹ The hearing representative denied appellant’s request for a subpoena on the grounds that no evidence was submitted to establish that the testimony of the identified persons was essential to the adjudication of her claim. The Board finds that the Office hearing representative properly exercised his discretion in denying appellant’s request for a subpoena. Appellant offered no reason why relevant evidence or testimony that she sought to compel through the subpoena process could not be obtained through other means.

²⁵ See *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

²⁶ 5 U.S.C. § 8126(1).

²⁷ 20 C.F.R. § 10.619.

²⁸ *Claudio Vazquez*, 52 ECAB 496 (2001).

²⁹ *Id.*

CONCLUSION

For the foregoing reasons, as appellant has not established met her burden of proof in establishing that she sustained an emotional condition in the performance of duty. The Board further finds that the Office properly denied appellant's request for subpoenas.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 7 and March 25, 2004 and are affirmed, as modified.

Issued: August 12, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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