



numerous promotions and both Ms. Bartee and Ms. Barber exhibited a “harassing demeanor.” He filed an Equal Employment Opportunity (EEO) complaint on May 20, 2003 and the alleged harassment increased afterwards. On July 14, 2003 Ms. Barber allegedly screamed at appellant during a team meeting. Later that same day, she allegedly grabbed and pushed him as he passed her in the hallway. Appellant filed a grievance in response to the July 14, 2003 incidents. He also alleged that, when he returned from vacation on July 29, 2003, Ms. Barber falsely accused him of hiding 27 pieces of mail behind his computer. An investigation ensued and appellant was reportedly exonerated of any wrongdoing.

Appellant did not advise the employing establishment’s police about the July 14, 2003 incident until August 13, 2003. That same day, Ms. Barber petitioned the local court for an injunction for protection against repeat violence.<sup>1</sup> Aware that she sought a protective order against appellant, Ms. Bartee reassigned him to another team and a different work area on August 15, 2003.<sup>2</sup> Appellant appeared in court on September 10, 2003 and the judge ruled in his favor and dismissed the restraining order.<sup>3</sup>

The Office received a copy of the July 21, 2003 grievance appellant filed regarding the July 14, 2003 incidents with Ms. Barber. During the July 14, 2003 team meeting, he attempted to ask a job-related question when Ms. Barber started screaming at him for no reason. He indicated that this was not the first time she “erupted into a fit of violent anger.” With respect to the second incident on July 14, 2003, appellant was on his way to the restroom when he noticed Ms. Barber and Robert Granstrom having a conversation in the middle of the hallway. He wanted to excuse himself as he passed by them, but Ms. Barber grabbed him by the arm and pushed him away. She reportedly told appellant that she was having a private discussion. The relief requested under the grievance was an apology from Ms. Barber and an agreement that supervisors would refrain from using aggressive language when providing instruction, training or discipline. Appellant also requested that disciplinary information be expunged from his personnel file.

Appellant, his union representative and Ms. Barber met on July 29, 2003 to discuss the grievance. In an August 4, 2003 memoranda, Ms. Barber granted the relief requested. With respect to the July 14, 2003 screaming incident and the request to refrain from using aggressive language, she agreed that all interactions between supervisor and employees should be conducted

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<sup>1</sup> In her August 13, 2003 affidavit to the court, Ms. Barber alleged that appellant followed her in his car as she drove home on August 7, 2003. She also indicated that, while at work he followed her on breaks, trips to the restroom and into the parking area. He would laugh eerily whenever he encountered Ms. Barber and he reportedly bragged about his gun collection. Ms. Barber stated that another female employee, now deceased, had filed a restraining order against appellant for the same reasons. She requested that he be barred from coming near her third floor work area as well as her home. Ms. Barber also indicated that the employing establishment was attempting to reassign appellant to a different floor and team.

<sup>2</sup> The Pinellas County Sheriff’s Department served appellant a copy of the injunction at his residence on August 19, 2003.

<sup>3</sup> By decision dated September 10, 2003, the court dismissed the temporary injunction, finding that Ms. Barber did not present sufficient evidence to support the request for protection against repeat violence. Appellant later sued Ms. Barber in small claims court to recover more than \$1,000.00 in attorney’s fees he incurred to defend against the protective order. On April 28, 2004 the court ordered Ms. Barber to repay appellant \$500.00, which she did.

in an atmosphere that is conducive to learning. Regarding the July 14, 2003 hallway incident, Ms. Barber noted that the relief requested was an appropriate apology to the offended employee for “physical conduct of touching his arm.” Her response was as follows: “I realize we work in extremely close quarters and physical contact with an employee is inappropriate. I apologize for touching [appellant], this will not happen again.”<sup>4</sup>

In an August 18, 2003 report, Dr. Walter E. Afield, a Board-certified psychiatrist, diagnosed cephalalgia, severe depression, severe anxiety, with possible panic attacks and post-traumatic stress disorder. He reported that appellant filed an EEO complaint on May 20, 2003 after being passed up for a promotion and since then, appellant felt he was being harassed and retaliated against. Dr. Afield also noted the July 14, 2003 incident when Ms. Barber screamed at appellant during a meeting and later grabbed his arm and pushed him as he walked past her in the hallway. He reported that appellant had filed charges against her and she later obtained a restraining order against him and had him moved to the opposite side of the building. Dr. Afield attributed appellant’s current psychiatric condition to his employment. Additional medical evidence included August 7 and September 16, 2003 neurological evaluations from Dr. Angelo M. Alves, a Board-certified neurologist, and a September 30, 2003 psychological evaluation from Leslie Ellis, Ph.D.

In a decision dated May 6, 2004, the Office denied appellant’s claim as he failed to establish a compensable employment factor as the cause of his emotional condition.

Appellant requested an oral hearing, which was held on February 14, 2005. The Office received additional progress notes from Dr. Afield covering the period October 6, 2003 to December 6, 2004.

In a March 14, 2005 statement, appellant identified another incident of alleged retaliation by Ms. Barber. On June 8, 2003 he received his leave and earning statement and noticed that he had mistakenly been charged for 12 hours of leave. The employing establishment also allegedly failed to pay appellant for overtime work performed. As his timekeeper, Ms. Barber was responsible for insuring the accuracy of his pay. Appellant alleged that this was the first instance of retaliation following his May 20, 2003 filing of an EEO complaint.

Appellant submitted an August 13, 2003 police report regarding the July 14, 2003 hallway incident. A male witness, whose name was redacted from the report, stated that he and Ms. Barber were talking when appellant attempted to walk between them. According to the witness, Ms. Barber told appellant that she was having a private conversation and he responded that he was only going to the restroom. The witness further stated that as appellant walked by, Ms. Barber touched his arm and he in turn touched her arm. The police investigator asked whether Ms. Barber touched appellant with any force and the witness responded “No.”

The Office also received information regarding two EEO complaints appellant filed. The first complaint pertained to his May 20, 2003 nonselection for the position of educational clerk. The second EEO complaint incorporated a number of incidents beginning with the July 14, 2003

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<sup>4</sup> Ms. Barber also reviewed appellant’s file and advised that there was no disciplinary information regarding the July 14, 2003 incident included in the file.

incident.<sup>5</sup> Appellant also alleged that Ms. Barber falsely accused him of stalking her when she petitioned the court for a protective order on August 13, 2003. He also challenged his August 15, 2003 reassignment.

The EEO Commission reviewed appellant's consolidated complaints and denied his claim in a decision dated February 28, 2005. With respect to the May 20, 2003 promotion denial, the EEO Commission accepted management's explanation that appellant was not selected for the job because he did not score as highly as the individual selected for the position. Regarding the July 14, 2003 hallway incident, the EEO Commission found that Ms. Barber denied that she "shoved" appellant and he failed to provide any corroborating evidence. He also failed to prove that Ms. Barber's August 13, 2003 request for a temporary restraining order and his August 15, 2003 reassignment were retaliatory in nature.

By decision dated April 12, 2005, the Office hearing representative affirmed the May 6, 2004 decision.

### **LEGAL PRECEDENT**

To establish that he sustained an emotional condition causally related to factors of his federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that his emotional condition is causally related to the identified compensable employment factors.<sup>6</sup>

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 hold a particular position.<sup>7</sup> 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.<sup>8</sup>

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<sup>5</sup> The documentation incorrectly identifies the incident date as August 13, 2005.

<sup>6</sup> See *Kathleen D. Walker*, 42 ECAB 603 (1991). Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

<sup>7</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>8</sup> *Ruthie M. Evans*, 41 ECAB 416 (1990).

## ANALYSIS

The first incident appellant identified as contributing to his claimed emotional condition was the employing establishment's May 20, 2003 selection of another employee for the position of educational clerk. He believed that his nonselection was discriminatory and he filed an EEO complaint. An employee's frustration from not being permitted to work in a particular environment or hold a particular position is not compensable.<sup>9</sup> The decision to select another individual for the position was a personnel matter, separate and distinct from appellant's regularly assigned duties.<sup>10</sup> As a general rule, an employee's reaction to administrative or personnel matters falls outside the scope of the Federal Employees' Compensation Act.<sup>11</sup> 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.<sup>12</sup>

Appellant filed a complaint regarding his nonselection and the EEO determined that he had not been discriminated against. The EEO Commission's February 28, 2005 decision indicated that the employing establishment selected another employee for the position who outscored him by more than 40 points. Appellant has failed to present any evidence that the employing establishment either erred or acted abusively in denying him the position of educational clerk on May 20, 2003.

Appellant also claimed that Ms. Bartee and Ms. Barber harassed him following the May 20, 2003 filing of an EEO complaint. For harassment to give rise to a compensable disability there must be evidence that harassment occurred.<sup>13</sup> A claimant's mere perception of harassment is not compensable.<sup>14</sup> The allegations of harassment must be substantiated by reliable and probative evidence.<sup>15</sup>

In an October 30, 2003 statement, appellant alleged a "harassing demeanor" from Ms. Bartee and Ms. Barber. He later described specific incidents involving both individuals that he claimed were acts of retaliation for filing his EEO complaint. Appellant's general allegation of a "harassing demeanor" does not constitute a compensable factor because of the lack of specificity.

On or about July 8, 2003 appellant learned that his leave and earnings statement did not properly reflect his overtime hours and leave usage. The gist of appellant's allegation is that

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<sup>9</sup> See *Lillian Cutler*, *supra* note 8.

<sup>10</sup> *Andrew J. Sheppard*, 53 ECAB 170, 173 (2001).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

<sup>14</sup> *Id.*

<sup>15</sup> *Joel Parker Sr.*, 43 ECAB 220, 225 (1991).

Ms. Barber, his timekeeper, allowed this to occur in retaliation for his May 20, 2003 filing of an EEO complaint. He submitted copies of his earnings and leave statements for June and July 2003. This documentation, however, does not identify Ms. Barber as the responsible timekeeper, nor does it reveal a retaliatory intent. Moreover, appellant did not submit any proof to substantiate his allegation that the earnings and leave statements were inaccurate.<sup>16</sup>

On July 14, 2003 Ms. Barber reportedly screamed at appellant during a morning team meeting. In his March 14, 2005 statement, appellant indicated that he raised his hand to ask a work-related question and Ms. Barber refused to recognize him. She continued to ignore appellant and when he tried to speak, allegedly erupted into a violent rage and started screaming at him for no reason. According to appellant, Ms. Barber stated that she did not want to hear another word from him and she would not answer any of his questions. Verbal abuse or threats of physical violence in the workplace are compensable under certain circumstances.<sup>17</sup> This, however, does not imply that every ostensibly abusive or threatening statement uttered in the workplace will give rise to coverage under the Act.<sup>18</sup> Verbal altercations and difficult relationships with supervisors, when sufficiently detailed and supported by the record, may constitute compensable factors of employment.<sup>19</sup>

Ms. Barber did not dispute appellant's allegation that she ignored him on the morning of July 14, 2003. In her August 4, 2003 response to his grievance, Ms. Barber acknowledged that all interactions between supervisor and employees should be conducted in an atmosphere that is conducive to learning. The evidence of record is insufficient to establish compensable verbal abuse. Accepting that she ignored appellant, raised her voice when he attempted to speak and told him she did not want to hear another word from him, the evidence does not constitute verbal abuse.

Ms. Barber subsequently encountered appellant in the hallway. In an effort to prevent him from hearing her "private conversation" with Mr. Granstrom, Ms. Barber attempted to stop appellant as he passed between them in route to the restroom. Ms. Barber acknowledged and a witness confirmed, that she touched his arm as he attempted to pass. Appellant stated that Ms. Barber "grabbed" and "pushed" him. In her August 4, 2003 memorandum, Ms. Barber described the incident as "physical conduct of touching [appellant's] arm." She also acknowledged that "physical contact with an employee [was] inappropriate" and apologized for touching him.

The Office hearing representative found that this incident was noncompensable because appellant did not provide independent evidence corroborating his account. The hearing representative acknowledged that Ms. Barber acknowledged touching appellant, but stated that

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<sup>16</sup> 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. *Dinna M. Ramirez*, 48 ECAB 308, 313 (1997).

<sup>17</sup> *Fred Faber*, 52 ECAB 107, 109 (2000).

<sup>18</sup> *Id.*

<sup>19</sup> *Marguerite J. Toland*, 52 ECAB 294, 298 (2001).

she did not admit to either grabbing or pushing him. He also found that her apology and her admission that the physical contact was inappropriate did not amount to proof that she acted abusively or erroneously. The hearing representative further commented that the police report indicated that “only light touching of no force took place.” The Office hearing representative noted that the EEO Commission did not find that this incident was discriminatory.

Physical contact by a coworker or supervisor may give rise to a compensable work factor if the incident occurred as alleged.<sup>20</sup> Contrary to the hearing representative’s finding, appellant need not demonstrate that Ms. Barber’s conduct was erroneous or abusive in order to establish a compensable factor. The July 14, 2003 hallway incident was not an administrative or personnel matter. Ms. Barber’s stated purpose was to prevent appellant from hearing her private conversation with Mr. Granstrom. She could have accomplished this by moving out of the hallway or she could have stopped talking until appellant passed. Whether Ms. Barber’s physical contact with him was accidental, incidental or benign and the amount of force she applied to his arm is not determinative as to compensability. It is well established that physical contact by a coworker or supervisor may give rise to a compensable work factor.<sup>21</sup> There exists in the record substantial and unrefuted evidence that appellant’s supervisor touched his arm on that date, as noted by the witness’ statement. The Board finds that Ms. Barber’s physical contact with appellant on July 14, 2003 represents a compensable employment factor.

The next instance of alleged retaliation occurred when appellant returned from vacation on July 29, 2003. He stated that Ms. Barber falsely accused him of hiding 27 pieces of mail behind his computer. Appellant also claimed that he was later exonerated of any wrongdoing. However, he did not submit any corroborating evidence and the employing establishment did not indicate that appellant was counseled, investigated or otherwise disciplined for alleged mishandling of mail. Complaints about the manner in which a supervisor performs her duties or the manner in which a supervisor exercises her discretion fall, as a rule, outside the scope of coverage provided by the Act.<sup>22</sup> This principle recognizes that a supervisor or manager in general must be allowed to perform her duties and employees will, at times, dislike the actions taken, but mere disagreement or dislike of a supervisory or managerial action will not be actionable, absent evidence of error or abuse.<sup>23</sup>

Appellant also claimed that Ms. Barber falsely accused him of stalking her. He alleged that the protective order she obtained on August 13, 2003 was another instance of retaliation. Appellant claimed that Ms. Barber petitioned the court only after learning that he had filed a police report. He has not submitted any evidence in support of his allegation of retaliation. Moreover, Ms. Barber’s decision to seek a protective order was not employment related, but personal in nature. Appellant was subsequently reassigned to a different supervisor as of August 15, 2003. There is no evidence of error or abuse on Ms. Barber’s part in reassigning appellant. The fact that the protective order was dismissed less than a month later and

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<sup>20</sup> *Denise Y. McCollum*, 53 ECAB 647, 648 (2002).

<sup>21</sup> *See Helen Calillas*, 46 ECAB 1044 (1995); *Alton L. White*, 42 ECAB 666 (1991).

<sup>22</sup> *Marguerite J. Toland*, 52 ECAB 294, 299 (2001).

<sup>23</sup> *Id.*

Ms. Barber was subsequently ordered to reimburse appellant for \$500.00 in attorney's fees does not establish that her accusations were false, retaliatory or malicious. The August 13, 2003 protective order and the consequences that stemmed from its enforcement in the workplace were largely beyond the employing establishment's control. Accordingly, the Board finds that Ms. Barber's decision to obtain a protective order and the employing establishment's implementation of that order are not compensable factors of employment.<sup>24</sup>

Appellant has established a compensable employment factor; on July 14, 2003 Ms. Barber touched him on the arm as he passed her in the hallway in route to the restroom. The Office's April 12, 2005 decision is modified to reflect this finding. Because the Office previously found no compensable factors established, it did not review the medical evidence of record. The case will be remanded to the Office for further development as it deems necessary followed by the issuance of an appropriate *de novo* decision on the merits.

### **CONCLUSION**

The Board finds that the case is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 12, 2005 decision of the Office of Workers' Compensation Programs is affirmed as modified and the case is remanded to the Office for further action consistent with the Board's decision.

Issued: October 18, 2005  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

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

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<sup>24</sup> The EEO Commission was unconvinced that Ms. Barber's August 13, 2003 request for a protective order and appellant's August 15, 2003 work reassignment were retaliatory or discriminatory in nature.