

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

MARILYN JONES, Appellant

and

**DEPARTMENT OF THE ARMY, ARMY
CORPS OF ENGINEERS, Jacksonville, FL,
Employer**

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**Docket No. 05-382
Issued: January 19, 2006**

Appearances:
Marilyn Jones, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 30, 2004 appellant filed a timely appeal from a September 10, 2004 merit decision of the Office of Workers' Compensation Programs finding that she did not establish an emotional condition in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On January 20, 2003 appellant, then a 40-year-old secretary, filed an occupational disease claim alleging that she sustained anxiety and major depression due to factors of her federal employment. She related that she was "physically assaulted and degraded" by a coworker in June 1999 and that the employing establishment tried to cover up the assault. Appellant asserted

that she was retaliated and discriminated against after filing Equal Employment Opportunity (EEO) complaints. She did not stop work. On the reverse side of the claim form, appellant's supervisor noted that she was no longer working for the organization where the claimed illness began.

In a statement dated June 7, 1999, appellant related that on that date she asked a coworker, Alice Kirkland, for her sign-in sheets. She stated:

"Ms. Kirkland turned around to face me and pointed to the floor and said 'there [is] my sign in sheet and that [is] my out box if you want it then you get [it].' I then said to Ms. Kirkland that I would [not] pick up her sign in sheet off of the floor. Then Ms. Kirkland jump[ed] out of her chair and grabbed her sign in sheet from the floor and smashed it into my chest and breast area very roughly."

Appellant related that when she spoke with Kelly Enright, a supervisor, about the incident Ms. Enright "made excuses for Ms. Kirkland's behavior and totally blamed me for Ms. Kirkland's actions."

In a statement dated June 9, 1999, appellant indicated that she discussed the June 7, 1999 incident with John Hall, the head of the regulatory division. Mr. Hall expressed concern that she was on probation and argued that "[t]his was improper and cruel and coercive of management to try and link the two incidents together and threaten me if I pursue this incident."

Appellant filed an incident report with the sheriff's office regarding the June 7, 1999 altercation with Ms. Kirkland. She related that when she refused to pick up paper off the floor Ms. Kirkland "shoved it into [her] chest." The report indicated that appellant "stated that she did not sustain any injuries" but "wanted the incident documented."

The record contains correspondence from the employing establishment to appellant directing her to attend physical and psychiatric examinations. In a letter dated September 25, 2002, Richard Peters, a Lieutenant Colonel with the employing establishment, referred her to the Employee Assistance Program (EAP). He noted that she had a "history of inappropriate conduct" toward supervisors and coworkers. Mr. Peters indicated that appellant received suspensions in April 1999, March and June 2002. He noted that she had requested a transfer from the regulatory division in June 2002.

On December 9, 2002 appellant was reassigned from the regulatory division to the Information Management Office.

In a statement dated January 31, 2003, an official with the employing establishment noted that appellant "indicates she was physically assaulted and degraded by [a] coworker" but that the police report did not show that she sustained any injury. The official stated that appellant was assigned to the regulatory division in April 1999 as part of a disciplinary proceeding and that she requested reassignment out of the division in June 2002. She indicated that the employing establishment requested medical documentation of appellant's physical and mental conditions as part of her reassignment request and, when that was not forthcoming, referred her for evaluations. The official denied that security followed her or that employees attempted to make her misbehave on May 22, 2002. It was noted that a picture that appellant deemed offensive was

removed. The official also asserted that appellant wanted to receive recognition for a letter mistakenly sent to her rather than to another employee with a similar name. She related that the September 25, 2002 letter from Mr. Peters contained a typographical error and that the date of suspension should be March 2000 rather than March 2002.

Appellant submitted a statement describing problems with her performance appraisals from 1998 to 2002. She noted that her 1998 appraisal was late and that, in 1999, her rating was too low and she did not receive a cash award. Appellant stated that in 2000 her performance appraisal contained grammatical errors and was changed to a higher rating. She did not receive a letter of appreciation until March 2001. Her 2001 appraisal was late and her 2002 appraisal, by Eric Summa, was retaliatory. Appellant indicated that for three days Mr. Summa had a "very offensive African-American picture hanging in his office" of a television actor, Gary Coleman.

In a letter dated August 27, 2002, eight of appellant's coworkers requested her reassignment, asserting that she created a "disruptive, hostile and unbearable work environment" and was unapproachable in regard to day-to-day tasks.

By letter received by the Office on March 20, 2003, appellant related that Mr. Peters harassed her and ordered her to have physical and mental evaluations. She further noted that she was not suspended in March 2002 as indicated by Mr. Peters in a September 25, 2002 letter and that she requested reassignment five times. Appellant alleged that the head of security followed her on three occasions and that she received the June 7, 2002 letter of counseling because her coworkers engaged in a plot to witness her conversations. She challenged her January 14, 2000 30-day suspension. Appellant argued that it was not clear that a September 2002 letter thanking her for her contribution was actually intended for another employee with a similar name. She also asserted that, after her reassignment to the Information Management Office in December 2002, her desk and keys were vandalized and that she continued to be harassed. She also noted that the EEO office violated the law. In letters dated January 6 and 19, 2000, appellant described incidents where Mr. Hall raised his voice to her.

In a decision dated August 28, 2003, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors.

By letter received by the Office on May 25, 2004, appellant requested reconsideration. She argued that the Office erroneously applied the law to her case, that she did not request reassignment to a specific office, and that the employing establishment covered up the June 1999 physical assault. Appellant noted that her coworkers, who were white, received their commendation letters in a timely manner. She alleged that in February 2003 her desk was broken into and computer discs taken from her purse in an attempt to silence her. Appellant contended that she did not receive work assignments for weeks.

In electronic correspondence dated July 16, 1999, received by the Office on May 25, 2004, Mr. Hall noted that he found "no conclusive evidence one way or the other about a physical assault" and that "[a]bsent conclusive evidence, I certainly intend to take no further action beyond what I have already taken and documented."

By letter received by the Office on July 6, 2004, an official with the employing establishment again described the circumstances surrounding the request for appellant to undergo medical examinations. The official indicated that an investigation did not show evidence that appellant's desk was broken into but found some bent keys.

Appellant, in a letter dated August 9, 2004, reiterated the incidents to which she attributed her condition. She argued that the employing establishment erred in attempting to evaluate her mental condition and challenged the findings of the physicians. Appellant also contended that she was erroneously denied administrative leave. She further alleged that a coworker cursed and pointed at her and that unknown coworkers destroyed her Christmas candles, her computer discs and emails.

By decision dated September 10, 2004, the Office denied modification of its August 28, 2003 decision.

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.¹ 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.²

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.³ However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.⁴ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.⁵

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

² *Gregorio E. Conde*, 52 ECAB 410 (2001).

³ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

⁴ See *William H. Fortner*, 49 ECAB 324 (1998).

⁵ *Ruth S. Johnson*, 46 ECAB 237 (1994).

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.⁶ A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.⁷ 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.⁸ 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.⁹

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.¹⁰ 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.¹¹

ANALYSIS

Appellant attributed her condition, in part, to harassment and discrimination by her supervisors. The Board has held that actions of an employer which the employee characterized as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that the harassment or discrimination did in fact occur.¹² Mere perceptions and feelings of harassment or discrimination will not support an award of compensation.¹³ Appellant contended that her supervisor, Mr. Summa, placed a

⁶ See *Michael Ewanichak*, 48 ECAB 364 (1997).

⁷ See *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004); *Parley A. Clement*, 48 ECAB 302 (1997).

⁸ See *James E. Norris*, 52 ECAB 93 (2000).

⁹ *Beverly R. Jones*, 55 ECAB ____ (Docket No. 03-1210, issued March 26, 2004).

¹⁰ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹¹ *Id.*

¹² *Lori A. Facey*, 55 ECAB ____ (Docket No. 03-2015, issued January 6, 2004).

¹³ *Id.*

degrading picture of a black television actor on the wall of his office. An official with the employing establishment noted that Mr. Summa immediately removed the picture in response to appellant's complaint that she considered the picture offensive. The record contains no evidence that Mr. Summa placed the picture on his wall in an attempt to harass or discriminate against appellant.¹⁴ Further, there is no evidence of error or abuse by the employing establishment in dealing with her complaint about the picture.

Appellant described additional incidents which she alleged established harassment and discrimination, including failing to receive a letter of commendation in a timely manner and being followed around by security. She also stated that coworkers had a plot against her to witness her conversations. Appellant contended that coworkers broke into her desk and destroyed her keys, candles, computer discs and emails. She has not, however, established that the described events actually occurred as she provided no corroborating evidence, such as witness statements, in support of her allegations. The employing establishment denied that security followed her around, or that her coworkers plotted to make her misbehave and broke into her desk. Appellant, consequently, has not established a compensable employment factor with respect to the alleged harassment and discrimination.

Appellant additionally alleged that Mr. Hall shouted at her and another coworker cursed at her. The Board has held that verbal altercations, when sufficiently detailed by the claimant and supported by the evidence, may constitute compensable employment factors.¹⁵ This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.¹⁶ In this case, appellant has not submitted any factual evidence supporting that any of the alleged statements or raised voices actually occurred. As appellant has not submitted any evidence supporting her allegations of verbal abuse, she has not established a compensable factor of employment.

Regarding appellant's allegations that the employing establishment wrongfully handed her leave requests, reassignments, performance appraisals, letters of commendation, work assignments; wrongfully required medical examinations and engaged in improper disciplinary actions, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within coverage of the Act.¹⁷ Although the handling of disciplinary actions, evaluations, leave requests, reassignments, commendations, assignment of work and requiring fitness-for-duty examinations are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹⁸ The Board has found, however, that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or

¹⁴ *Denise Y. McCollum*, 53 ECAB 647 (2002).

¹⁵ *Janet D. Yates*, 49 ECAB 240 (1997).

¹⁶ *Christophe Joliceur*, 49 ECAB 553 (1998).

¹⁷ *Paul L. Stewart*, 54 ECAB 824 (2003); *Andy J. Paloukos*, 54 ECAB 712 (2003); *Roger W. Robinson*, 54 ECAB 689 (2003); *Debora L. Hanna*, 54 ECAB 548 (2003).

¹⁸ *Id.*

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.¹⁹ In this case, an official with the employing establishment explained that appellant requested a reassignment and that it needed medical evidence to establish her work capacity. Appellant has submitted no evidence, such as a final EEO decision, to show that the employing establishment erred in an administrative matter and thus has not established a compensable employment factor.

Appellant further alleged that Ms. Kirkland physically assaulted her with a sign-in sheet on June 7, 1999. She filed an incident report with the police which stated that when she refused to pick paper off the floor Ms. Kirkland took the paper and “shoved it into [her] chest.” Physical contact by a coworker or supervisor may give rise to a compensable work factor if the incident occurred as alleged.²⁰ Appellant must, however, establish a factual basis for her claim by supporting her allegations with probative and reliable evidence.²¹ In this case, appellant has not established as factual that physical contact occurred between herself and Ms. Kirkland. In an email message dated July 16, 1999, Mr. Hall related that his investigation revealed “no conclusive evidence one way or the other about a physical assault” and thus he was taking no further action. Appellant has not submitted affirmative evidence corroborating her allegations that the described physical contact occurred as alleged and, thus, she has not established a factual basis for her allegation.

As appellant failed to establish any compensable factors of employment, the Board finds that the Office properly denied her claim.

CONCLUSION

The Board finds that appellant has not established an emotional condition in the performance of duty.

¹⁹ *Myrna Parayno*, 53 ECAB 593 (2002).

²⁰ *Denise Y. McCollum*, 53 ECAB 647 (2002).

²¹ *Andrew J. Sheppard*, 53 ECAB 170 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 10, 2004 is affirmed.

Issued: January 19, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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