



reprisals, threats and retaliation for filing Equal Employment Opportunity (EEO) complaints. Appellant used intermittent leave beginning on October 2, 2001.

In a July 28, 2004 letter, the Office advised appellant of the additional evidence needed to establish her claim, including a detailed description of the work incidents alleged to have caused the claimed condition and corroborating witness statements. The Office also requested a report from appellant's attending physician explaining how and why the identified work factors would cause the claimed conditions.

In a June 7, 2004 letter, Dr. Brian I. Kawahara, an employing establishment supervisor, noted that appellant had two EEO complaints under investigation. He did not address appellant's allegations regarding events on or before October 21, 2001.

In a September 11, 2004 report, Dr. Teresita R. Cottrell, an attending licensed clinical psychologist, noted appellant's account of harassment and discrimination at work. She diagnosed post-traumatic stress disorder, generalized anxiety disorder and depressive disorder. Dr. Cottrell opined that these conditions were work related.

Appellant submitted correspondence dated from April 2003 to December 2004, relating to the investigation of her EEO claims for harassment and discrimination. There are no final decisions of record regarding these claims.<sup>1</sup>

By decision dated July 8, 2005, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that appellant failed to establish any compensable factors of employment as she failed to substantiate her claims of harassment and discrimination.

In a July 5, 2006 letter, appellant requested reconsideration. She attributed her condition to being denied a promotion in 2000 after applying three times as her first two applications were misplaced. Appellant contended that Dr. Kawahara denied her request to work part time in 2001 during her pregnancy and that he refused to meet with her as he did with other employees. She stated that she was "pressured" due to her Nigerian national origin and that coworkers told others to "watch out" for her. Appellant submitted additional evidence.<sup>2</sup>

In an August 12, 2003 affidavit pertaining to appellant's EEO claims, Phoebe Ha, a coworker, stated that on unspecified dates, Mr. Chan told her to avoid appellant. Ms. Ha asserted that appellant's coworkers tended to ignore her.

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<sup>1</sup> The record contains a January 11, 2005 letter requesting reconsideration of a decision of the Office issued on an unspecified date in 2004. This request does not pertain to the claim now before the Board on the present appeal.

<sup>2</sup> Appellant submitted documents regarding workplace events after October 21, 2001: July 29, 2004 affidavits of Supervisor Elise Almera and Coworkers Sam Maze, Gloria Uballez and Gregory Underwood; an August 12, 2003 affidavit by Supervisor Ron Chan; appellant's letters reiterating her account of events; correspondence regarding her pending EEO claims.

In an August 20, 2003 EEO affidavit, Dr. Kawahara refuted appellant's allegations of harassment and discrimination. He noted that, on an unspecified date, he accidentally failed to meet with appellant but met with her soon after and apologized for his oversight.

In an August 27, 2004 e-mail, Ms. Uballez stated that appellant was patient with her customers, did her best to explain things and was not rude. In a July 10, 2006 letter, Della Alleyne, a coworker, stated that appellant was professional, helpful and courteous.

In an October 13, 2004 EEO affidavit, Ms. Ha asserted that on unspecified dates, appellant experienced harassment by supervisors of Vietnamese or Chinese national origin.

In a December 8, 2004 e-mail, appellant's coworker Don Grenier stated that, on an unspecified date, Ms. Almera warned him that appellant was a troublemaker and would be fired. Ms. Almera then instructed other workers not to speak with appellant.

By decision dated October 19, 2006, the Office denied modification of the July 8, 2006 decision. The Office found that appellant failed to establish any compensable factors of employment occurring on or before October 21, 2001.

### **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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>5</sup> See *Norma L. Blank*, 43 ECAB 384 (1992).

record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.<sup>6</sup>

### ANALYSIS

Appellant alleged that she sustained an emotional condition with consequential headaches and hypertension as a result of employment incidents and conditions which the Office found not to have occurred. Therefore, the Board must review whether appellant submitted sufficient evidence to establish the alleged incidents and conditions as factual, compensable employment factors under the terms of the Act.

Appellant attributed her emotional condition to a pattern of harassment, discrimination and hostility by her supervisors and coworkers on or before October 21, 2001. She submitted EEO grievance documents regarding her allegations. Incidents of harassment by supervisors and coworkers, if established as occurring and arising from the employee's performance of his or her regular duties, may constitute employment factors.<sup>7</sup> However, the issue is not whether the claimant has established harassment or discrimination under standards applied by the EEO Commission. Rather, the issue is whether the claimant, under the Act, has submitted evidence sufficient to establish an injury arising in the performance of duty.<sup>8</sup> For harassment to give rise to a compensable disability under the Act, there must be probative and reliable evidence that harassment or discrimination did in fact occur.<sup>9</sup> Mere perceptions of harassment are not compensable under the Act.<sup>10</sup>

In support of her allegations of harassment and discrimination, appellant provided coworker affidavits asserting that on unspecified dates, Mr. Chan told a coworker to avoid her, Ms. Almera stated that appellant was a troublemaker and that she was harassed by supervisors of Chinese or Vietnamese national origin. However, the Board finds that these documents are too vague to establish harassment. While Ms. Alleyne and Ms. Uballez asserted that she was a professional and courteous employee, these affidavits do not address any of the alleged work factors raised by appellant. Therefore, the statements do not establish a compensable factor of employment. Dr. Kawahara, a supervisor, refuted appellant's allegations of harassment and discrimination in his August 20, 2003 affidavit. Moreover, there are no final determinations of record regarding appellant's EEO grievances. The evidence presently of record is not sufficient to establish instances of harassment or discrimination by specific supervisors or workers on specific dates. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

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<sup>6</sup> *Id.*

<sup>7</sup> *Janice I. Moore*, 53 ECAB 777 (2002).

<sup>8</sup> *See Martha L. Cook*, 47 ECAB 226 (1995).

<sup>9</sup> *Marlon Vera*, 54 ECAB 834 (2003).

<sup>10</sup> *Kim Nguyen*, 53 ECAB 127 (2001).

Appellant also attributed her condition, in part, to being denied a promotion in 2000. The Board notes that she did not receive a promotion for which she applied in 2000. However, the Board has held that denials of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.<sup>11</sup> Appellant has thus failed to establish a compensable factor of employment in this regard.

Appellant also attributed her condition to being denied a part-time schedule in 2001. The Board finds that she submitted insufficient evidence to establish error or abuse pertaining to this administrative matter. Appellant also attributed her condition to Dr. Kawahara not meeting with her on an unspecified date. Dr. Kawahara confirmed that he once forgot to meet with appellant but could not recall the date on which the incident occurred. The Board finds that the vagueness of appellant's and Dr. Kawahara's recollections are insufficient to establish the incident as a compensable factor of employment.

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty as she failed to establish any compensable factors of employment. As appellant has not established any compensable work factors, the medical record need not be addressed.<sup>12</sup>

### **CONCLUSION**

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty on or before October 21, 2001.

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<sup>11</sup> *Ernest J. Malagrida*, 51 ECAB 287 (2000).

<sup>12</sup> *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 19, 2006 is affirmed.

Issued: August 23, 2007  
Washington, DC

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

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

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