



psychiatrist, who stated that her post-traumatic stress rendered her totally disabled for work until December 1, 2005. An October 19, 2005 disability certificate of Dr. Edmond Liu, a Board-certified family practitioner, stated that appellant was ill and excused from work for three days.

By letter dated October 31, 2005, the employing establishment controverted appellant's claim. It contended that she failed to provide sufficient factual and medical evidence to establish her allegations.

By letter dated November 8, 2005, the Office addressed additional factual and medical evidence appellant was advised to submit to support her claim.

In a November 26, 2005 narrative statement, appellant described the October 17, 2005 incident. At 7:45 p.m. she arrived late to work in the nixie unit. Appellant told Dolly Chen, a coworker, that she was going to write a statement for a grievance during her break. At approximately 9:40 p.m., David Jones, a manager trainee, was in the nixie unit talking to Ms. Chen, and other coworkers, Tess Hidalgo and Celina Tallada, about nixie mail when Ms. Whitehurst came into the unit. She started shouting at them in a loud voice. Ms. Whitehurst pointed to her radio and told Mr. Jones to go back where he belonged. Appellant described Ms. Whitehurst's behavior as unprofessional and abusive. She stated that Mr. Jones was very embarrassed.

At 10:00 p.m. appellant took a break to write the statement for her grievance she had filed against a supervisor. At approximately 10:10 p.m., Glossy DeGuzman, an acting supervisor of distribution operations (SDO), entered the unit followed by Ms. Whitehurst, who stood behind appellant and in a loud voice asked her what she was doing. Appellant advised Ms. Whitehurst that she was writing a grievance. Ms. Whitehurst berated her loudly and ferociously in front of her coworkers about writing the grievance on company time. She instructed appellant to write it during her break or lunch. Appellant became embarrassed and nervous. She informed Ms. Whitehurst that she was at lunch. Ms. Whitehurst asked appellant how long she had been working at the employing establishment and she stated 10 years. She shouted that appellant was supposed to know that she could not use company hours to write a grievance. Appellant was seated beside Ms. Chen and Ms. Whitehurst came between them. She pointed her radio at Ms. Chen and shouted at appellant to look at and talk to her. Appellant stated that Ms. Whitehurst angrily hit her desk with the radio. She becomes scared and intimidated. Ms. Whitehurst asked Ms. DeGuzman to escort Ms. Chen out of the unit. Appellant placed her grievance in a cardboard box on her desk which contained other personal items. Ms. Whitehurst asked her what she had put in the box and went through the box without asking permission. After noticing nixie date stamps and tapes, she stated in a loud voice that they were the employing establishment's property. Appellant sought medical treatment from the employing establishment's medical unit. She described symptoms she experienced following the October 17, 2005 incident, which included the inability to sleep, stress and nervousness.

In an October 24, 2005 narrative statement, Patsy Harmon, a hearing impaired employee, stated that an MDO came into the unit and asked appellant many questions about what she was writing. Ms. Harmon stated that the MDO looked mad and appellant looked scared and nervous. She could not hear what they were talking about. Ms. Harmon stated that the MDO was abusive towards appellant and had a very bad attitude.

In an October 27, 2005 narrative statement, Ms. Chen described the October 17, 2005 incident, stating that Ms. Whitehurst yelled at appellant for writing a grievance on company time and hit appellant's desk with her radio. Appellant was very upset and speechless as a result of Ms. Whitehurst's actions. Ms. Chen related that, when Ms. Whitehurst left the unit five to eight minutes later, she used profane language while talking to herself.

In a December 27, 2005 letter, Ms. Whitehurst contended that appellant did not sustain an injury on October 17, 2005. She provided a description of the incident, stating that at approximately 8:30 p.m. she walked through the nixie unit and observed appellant writing on a tablet. Ms. Whitehurst stated that appellant did not see her. She saw Mr. Jones talking to Ms. Chen and asked him to leave the unit since he did not belong there at that time. Around 9:30 p.m. Ms. Whitehurst walked through the nixie unit again. She observed appellant still writing. Ms. Whitehurst asked Ms. DeGuzman to investigate why appellant was writing on company time when she was supposed to be working and one hour had already passed. She related that Ms. Chen was in the unit due to her light-duty assignment. Ms. DeGuzman asked Ms. Chen to return to her bid position. Ms. Whitehurst stated that appellant informed her that she was not on break but needed to write a statement for the union. She advised her that she could not do it while working. Ms. Whitehurst denied being in appellant's face or that she or any other manager became violent or had an argument with her. She stated that Ms. Chen did not witness her conversation with appellant because she was asked to leave the unit.

In a December 3, 2005 report, Dr. Karalis reviewed a history of injury that on October 17, 2005 appellant was verbally and physically assailed by Ms. Whitehurst when she grabbed her possessions and approached her closely. Appellant feared for her safety. Dr. Karalis opined that appellant suffered from post-traumatic stress with anxiety and depression on Axis I and occupational stress on Axis 4. She had a global assessment functioning score of 45. Dr. Karalis found no personality disorder on Axis 2 and no psychical contributing maladies on Axis 3. In a January 11, 2006 report, he stated that appellant continued to be actively symptomatic and was totally disabled until further medical evaluation. Dr. Karalis noted that she had not received any assurances from the employing establishment about her safe return to work.

On April 24, 2006 Ms. Chen clarified her prior statement as the Office was concerned that it was similar to appellant's statement of injury. She stated that she wrote her own statement but the union typed it. Ms. Chen was only present during the first part of the conversation between appellant and Ms. Whitehurst because she was asked to leave. She tried to put herself in appellant's shoes and stated that everyone was afraid of Ms. Whitehurst. Ms. Chen described Ms. Whitehurst's questioning of appellant as an interrogation.

By letter dated April 27, 2006, the Office requested additional factual evidence from Ms. DeGuzman, Ms. Hidalgo, Ms. Tallada and Ms. Whitehurst regarding the October 17, 2005 incident.

In a May 2, 2006 letter, Ms. Whitehurst reiterated her description of the October 17, 2005 incident. She denied searching through appellant's personal belongings. Ms. Whitehurst did not know that appellant had them on the workroom floor. She noted the employing establishment's policy against having personal belongings on the workroom floor, especially in the nixie unit

where accountable items were held. Ms. Whitehurst stated that she spoke to appellant in her normal tone of voice.

In a May 2, 2006 letter, Ms. DeGuzman stated that on October 17, 2005, at approximately 10:00 p.m., Ms. Whitehurst asked her to walk into the nixie unit. She observed appellant talking to Ms. Chen. After appellant informed Ms. Whitehurst that she was writing a grievance, Ms. Whitehurst instructed her to do it during her break or lunch. Ms. DeGuzman stated that Ms. Chen was answering to Ms. Whitehurst's questions, who responded that she was not talking to her. Ms. Whitehurst asked Ms. DeGuzman to take Ms. Chen out of the unit. After doing so, Ms. DeGuzman rejoined her in the nixie unit. Ms. DeGuzman stated that Ms. Whitehurst spoke in her usual tone of voice and told appellant that she should know better not to use the employing establishment's supplies for her personal use. She did not observe Ms. Whitehurst bang her radio or go through appellant's personal belongings. Ms. DeGuzman and Ms. Whitehurst stayed in the nixie unit for approximately 10 minutes.

In a May 4, 2006 narrative statement, Ms. Tallada stated that she only overheard bits and pieces of what was said between appellant and Ms. Whitehurst. She did not hear appellant's response to Ms. Whitehurst's question about what she was doing. Ms. Tallada heard Ms. Whitehurst tell appellant that she was not supposed to be doing something. She did not hear the rest as she went back to work. Ms. Tallada related that Ms. Whitehurst spoke to appellant in a loud voice. She did not know if Ms. Whitehurst hit her radio on appellant's desk. Ms. Tallada stated that Ms. DeGuzman was present at the beginning of the conversation between appellant and Ms. Whitehurst and then she left with Ms. Chen. She stated that the incident lasted 10 minutes and that appellant looked very upset.

On May 2, 2006 Dr. Karalis stated that appellant remained totally disabled for work through June 10, 2006.

By decision dated May 18, 2006, the Office found that appellant did not sustain an emotional condition in the performance of duty. It found that she failed to establish that the October 17, 2005 incident occurred as alleged.

In a July 22, 2006 letter, appellant, through her representative, requested reconsideration. She submitted an investigative report of Jose Nuno, a diversity development specialist, who interviewed the supervisors and appellant's coworkers regarding her December 10, 2005 grievance related to the October 17, 2005 incident. Anna Hilario, an acting supervisory MDO (SMDO), stated that on December 5, 2005, Ms. Whitehurst related to her that she did not shout or yell at appellant or empty her cardboard box. Ms. Whitehurst had asked appellant what she was doing and told her to complete the grievance during her break and not on company time. Gus Ortega, a SMDO, stated that, on October 17, 2005, appellant appeared shook-up and nervous. He asked her to go to the medical unit. Later that night, appellant related to Mr. Ortega that around 10:10 p.m., she was writing a grievance during her break when Ms. Whitehurst walked into the nixie unit. She stated that Ms. Whitehurst yelled at her while asking questions about using company time to complete the grievance. Appellant also stated that Ms. Whitehurst searched her personal nixie box. Mr. Nuno related that Ms. Whitehurst refused to answer any questions related to the October 17, 2005 incident as she had already spoken to an acting SMDO. Ms. Whitehurst stated that she was performing her job and denied shouting or yelling at

appellant or searching her box. She believed that several union representatives were trying to discredit her by having appellant file a traumatic injury claim and grievance.

Mr. Nuno stated that it appeared the nixie unit did not have constant supervision. When Ms. Whitehurst walked into the unit, the employees were caught by surprise that a MDO had walked into the unit and asked them questions. Mr. Nuno stated that Ms. Whitehurst's requested that Mr. Jones return to his work area set the tone and perception the employees had regarding her conversation with appellant. Based on his investigation, Ms. Whitehurst's tone of voice was loud and firm when she asked appellant questions. Mr. Nuno noted that the employees stated that appellant was soft spoken and not aggressive. Based on his conversation with Ms. Whitehurst, Mr. Nuno stated that she had a strong personality and was direct.

In a July 22, 2006 statement, appellant related that Ms. Whitehurst had asked Ms. DeGuzman to take Ms. Chen out of the nixie unit. She stated that Ms. DeGuzman did not return to the unit until Ms. Whitehurst left. In a July 20, 2006 statement, Ms. Chen stated that after Ms. Whitehurst asked Ms. DeGuzman to take her out of the nixie unit, she and Ms. DeGuzman stood outside the unit until Ms. Whitehurst left.

In a January 26, 2006 letter, the employing establishment stated that the investigation related that Ms. Whitehurst's tone of voice was loud when she questioned appellant on October 17, 2005. It stated that a senior MDO was going to meet with Ms. Whitehurst to address the investigative findings and determine any appropriate follow-up action.

In a settlement agreement dated April 4, 2006, the employing establishment apologized to appellant for any inappropriate conduct by Ms. Whitehurst on October 17, 2005. It reminded management to treat all employees with dignity and respect. The employing establishment stated that the settlement agreement constituted full and final settlement of all issues pertaining to the grievance. It also noted that it was not to be regarded as a precedent for any other purpose.

By decision dated November 9, 2006, the Office denied modification of the May 18, 2006 decision. In a November 2, 2007 letter, appellant, through her representative, requested reconsideration.

By decision dated February 4, 2008, the Office denied modification of the November 9, 2006 decision.

### **LEGAL PRECEDENT**

A claimant 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 factors of her federal employment.<sup>1</sup> To establish that she sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; (2) medical evidence establishing that she has an emotional or psychiatric disorder;

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<sup>1</sup> Pamela R. Rice, 38 ECAB 838 (1987).

and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.<sup>2</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,<sup>3</sup> the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.<sup>4</sup> 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 under the Act.<sup>5</sup> When an employee experiences emotional stress in carrying out her employment duties and the medical evidence establishes that the disability resulted from her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of her work.<sup>6</sup> 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 under the Act.

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>7</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 record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.<sup>8</sup>

Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. 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>9</sup> Generally,

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<sup>2</sup> See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

<sup>3</sup> 28 ECAB 125 (1976).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

<sup>6</sup> *Lillian Cutler*, *supra* note 3.

<sup>7</sup> See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

<sup>8</sup> *Id.*

<sup>9</sup> *Lillian Cutler*, *supra* note 3.

actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act.<sup>10</sup> However, 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.<sup>11</sup>

### ANALYSIS

Appellant attributed her emotional condition to being verbally harassed and physically assaulted by Ms. Whitehurst, a supervisor, on October 17, 2005 when she informed Ms. Whitehurst that she was writing a statement pertaining to a grievance, Ms. Whitehurst allegedly yelled that she was not supposed to do this even though she was at lunch. She further contended that, after she put the statement in a cardboard box on her desk, Ms. Whitehurst searched the box without permission. When Ms. Whitehurst discovered nixie date stamps and tapes in the box, she yelled at appellant that they belonged to the employing establishment. Appellant contends that Ms. DeGuzman did not witness the incident as she left the room with Ms. Chen and did not return until after Ms. Whitehurst left the unit. The Board notes that verbal abuse or harassment may give rise to coverage under the Act. However, there must be evidence that the implicated acts of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.<sup>12</sup> Ms. Harmon, a hearing impaired employee, stated that, an MDO looked mad while asking appellant many questions about what she was writing. She also stated that appellant looked scared and nervous. Ms. Harmon related that she could not hear what appellant and the MDO were talking about but she was also scared. She stated that the MDO was abusive towards appellant and she had a very bad attitude. Ms. Harmon did not state that the incident she described occurred on October 17, 2005 or that it involved Ms. Whitehurst.

Ms. Tallada stated that she heard Ms. Whitehurst ask appellant what she was doing but, she did not hear her response. She also heard Ms. Whitehurst tell appellant that she was not supposed to be doing something but, did not hear the remainder of the conversation because she went back to work. Ms. Tallada did not know if Ms. Whitehurst struck a radio on appellant's desk. She stated that the incident lasted 10 minutes and that appellant looked very upset. However, Ms. Tallada did not provide a description of the October 17, 2005 incident conforming to appellant's allegations did not hear the entire conversation between appellant and Ms. Whitehurst or verify that Ms. Whitehurst yelled at appellant in a loud voice. She subsequently stated that Ms. Whitehurst was in appellant's face and yelled at her when she asked her questions. Ms. Tallada believed that her behavior was unprofessional and that she spoke down to appellant. However, she did not adequately explain the basis for changing her statement

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<sup>10</sup> *Michael L. Malone*, 46 ECAB 957 (1995).

<sup>11</sup> *Charles D. Edwards*, 55 ECAB 258 (2004).

<sup>12</sup> *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); see *Faye Cardwell*, *supra* note 2 (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); see *Pamela R. Rice*, *supra* note 1 (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

or address the fact that she previously acknowledged that she did not hear the conversation between Ms. Whitehurst and appellant.

Mr. Ortega stated that appellant related to him that on October 17, 2005 Ms. Whitehurst yelled at her for writing a grievance while working and had searched her nixie box. However, he did not witness the October 17, 2005 incident. Mr. Ortega merely provided a history of the alleged incident as related to him by appellant. Mr. Jones stated that Ms. Whitehurst loudly asked him to return where he belonged. He was not present when she spoke to appellant.

Ms. Chen stated that Ms. Whitehurst yelled at appellant for writing a grievance on company time and struck appellant's desk with her radio. She related that, when Ms. Whitehurst left the unit five to eight minutes later, she used profane language while talking to herself. Ms. Chen stated that employees were afraid of Ms. Whitehurst and that she questioned appellant as if she was being interrogated. Despite the similarity between her description of the October 17, 2005 incident and that of appellant, Ms. Chen stated that her description was provided in her own words.

Based on his investigation of the October 17, 2005 incident, Mr. Nuno stated that the nixie unit did not experience constant supervision and that the employees in the unit were surprised by Ms. Whitehurst's presence that day. He further stated that her request that Mr. Jones return to his work unit set the tone and perception the employees had regarding the conversation she had with appellant. Based on his investigation, Mr. Nuno determined that Ms. Whitehurst's tone of voice was loud and firm when she asked appellant questions. He stated that she had a strong personality and was direct based on his conversation with her.

The employing establishment also determined that Ms. Whitehurst used a loud voice when she questioned appellant on October 17, 2005 based on Mr. Nuno's investigation. In its April 4, 2006 settlement agreement, the employing establishment apologized to appellant for any inappropriate conduct displayed by Ms. Whitehurst on October 17, 2005. It reminded management to treat all employees with dignity and respect. However, the settlement agreement provided that it should not be regarded as a precedent for any or proceeding.

Ms. Whitehurst's denied that she yelled at appellant or threw her radio on appellant's desk on October 17, 2005. Although, Ms. Whitehurst's loud voice may have engendered offensive feelings, it did not sufficiently affect the conditions of employment to constitute a compensable factor.<sup>13</sup> The evidence of record does not otherwise establish a pattern of verbal abuse or harassment by Ms. Whitehurst towards appellant. The evidence does not reflect that Ms. Whitehurst posed any physical threat to appellant. The investigation by Mr. Nuno found only that Ms. Whitehurst engaged in a load tone of voice in questioning appellant. The settlement agreement does not establish a compensable factor of employment. It provided that it could not be used as a precedent for any purpose in other proceedings. The Board finds that appellant has not established her allegation that she was harassed by her supervisor on

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<sup>13</sup> See *Denis M. Dupor*, 51 ECAB 482, 486 (2000).



October 17, 2005.<sup>14</sup> Accordingly, she has not established a compensable factor of employment.<sup>15</sup>

**CONCLUSION**

The Board finds that appellant has not established a compensable factor or that she sustained an emotional condition in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 4, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 22, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>14</sup> See *David S. Lee*, 56 ECAB 602 (2005).

<sup>15</sup> As appellant has not substantiated a compensable factor of employment as the cause of her emotional condition, the medical evidence regarding appellant's emotional condition need not be addressed. *Karen K. Levene*, 54 ECAB 671 (2003).