

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

D.P., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
El Cerrito, CA, Employer

)
)
)
)
)
)
)
)
)
)

**Docket No. 13-769
Issued: September 10, 2014**

Appearances:
Hank Royal, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 18, 2013 appellant, through her representative, filed a timely appeal from an August 29, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On June 4, 2011 appellant, then a 53-year-old casual clerk, filed an occupational disease claim alleging a major depressive disorder due to her federal employment. She first realized

¹ 5 U.S.C. § 8101 *et seq.*

her illness was caused or aggravated by her employment on May 6, 2011.² The employing establishment controverted the claim, noting that appellant was terminated at the expiration of her appointment on February 26, 2010. A February 4, 2010 letter from the employing establishment noted that appellant was separated due to unsatisfactory work practices and unbecoming conduct.³

On September 14, 2011 OWCP advised appellant that the evidence of record was insufficient to establish her claim. It requested that she submit additional evidence discussing the factors of her employment to which she attributed her condition together with a medical report from a physician addressing causal relationship.

In an October 10, 2011 statement, appellant alleged that on December 29, 2009 Angie Lan, her supervisor, instructed her to go home at 10:00 a.m. before she had finished casing her assigned box mail. When appellant inquired about the unfinished mail, Ms. Lan advised her not to worry about it. Before she clocked out, Ms. Lan asked appellant to come to her office for a “just cause” interview for failure to follow instructions. Appellant was unaware of any specific instructions that she did not follow and stated that the situation was stressful and intimidating. She had arrived an early hour and cased mail until she was told to leave. Appellant subsequently requested the interview notes but was refused. She alleged that, Denise Pace, the postmaster, stated, “this is your day in court and you can’t file a grievance because of your status.” When she repeated her request for a copy of the interview notes a week later, it was printed on deep red colored paper to prevent a clear photocopy from being made. Appellant stated that she lost sleep and had nightmares about being interrogated by her supervisor and the branch manager. She contended that she had performed her duties 100 percent and received 10 years of positive evaluations. Appellant stated that she had “orientated” Ms. Lan and Ms. Pace during their on-the-job training of backroom procedures. She alleged that she was harassed until January 14, 2010.

On December 31, 2009 appellant asked for a copy of her clerk duties after the postmaster shouted at her very loudly and rudely in front of other customers and staff around closing time. Ms. Pace accused her of not locking the doors at 5:00 p.m. Appellant stated that she had never received a copy of her duties and was unaware that locking doors was her responsibility. She asserted that the postmaster’s actions embarrassed her in front of coworkers and customers. Appellant noted that the doors were already locked, so she guarded the doors and let the remaining customers leave. Subsequently, appellant was forced to answer administrative questions at a meeting in the postmaster’s office with Ms. Lan. She noted that she had locked the door on other occasions only at the direction of supervisory staff. Appellant stated that she was not told to lock the door and that her request for a list of her mail clerk duties was denied. A few days later, she found a copy of clerk duties that had been given to another mail clerk. Appellant stated that the denial of her request was stressful.

² Appellant submitted medical reports from Dr. Arron Chapman, a Board-certified psychiatrist, who diagnosed a major depressive disorder.

³ OWCP also received a notification of personnel action in which appellant was separated effective February 26, 2010 due to “termination-expiration of appointment” as a casual employee.

Appellant alleged that on January 14, 2010 Ms. Lan accused her of not following instructions with regard to reporting for work. On the afternoon of January 11, 2010, before she was scheduled to work at 5:00 p.m., she had a telephone conversation with Ms. Lan, who advised her not to return at 5:00 p.m., but approved a return to work at 5:00 a.m. on January 12, 2010 to make up hours lost on the afternoon of January 11, 2010. This was why she reported to work at 5:00 a.m. and not because she ignored Ms. Lan's instructions. Appellant stated that she only reported to work when scheduled. She contended that Ms. Lan was aware of her scheduled hours of work and never questioned her arrival when she came to work that day. It was not until midday on January 14, 2010, while she was on her lunch break, that Ms. Lan approached her to discuss unauthorized hours. As appellant left the building, Ms. Lan followed her and reminded her to come back to work at 3:00 p.m. to cover the hours of a vacationing coworker. She replied, "I am going to lunch, Angie." Appellant alleged that Ms. Lan followed her around and reminded her about unauthorized hours which constituted harassment. She noted that, during her lunch hour that day, she telephoned Ms. Lan to ask for the Equal Employment Opportunity (EEO) telephone number. When appellant returned at 3:00 p.m., Ms. Lan told her in a harsh voice "to clock out and not return until called." She stated that this was retaliation because she had asked for the EEO number. Appellant stated that she was not given any more hours and was terminated.

In an August 1, 2010 statement, Katherine Edwards, a coworker, noted that her supervisor, Linda Shelton, notified all of morning clerks that appellant would be scanning the incoming parcels as "arrived at unit" and preparing them for the scheme clerks to distribute to the assigned carriers. She noted that appellant's tour began at 5:00 a.m.

In a September 10, 2010 statement, Pamela Heffington-Hall, a sales associate, explained that on December 31, 2009 the traffic at the window was light due to the holiday and she had the opportunity to lock the lobby door. She and a coworker, Michael Tu, a lead clerk, were serving the last few customers as it was 5:00 p.m., closing time. When Ms. Heffington-Hall returned to the window to service a remaining customer, she heard Ms. Pace yell from the back office doorway to appellant, "Why aren't you locking the doors?" At that point, appellant came from the breakdown/dispatch area to the lobby and told Ms. Pace that she was working in the dispatch area as instructed and that Ms. Heffington-Hall had already locked the door. She noted that Ms. Pace became angry and yelled "You mean Pamela had to lock the door?" Ms. Heffington-Hall explained that she was in the middle of a transaction with a customer and could not interrupt the transaction. She stated that the postmaster's yelling and demeanor had interrupted her transaction. Ms. Heffington-Hall stated that she had never witnessed appellant in anger, use inappropriate language, or refuse to follow instructions. She stated that appellant was productive, cooperative and respectful of others.

By letter dated December 12, 2011, OWCP requested comments from the employing establishment.

In a February 22, 2012 response, Ms. Pace noted that on December 29, 2009 Ms. Lan called appellant into her office for a "just cause" interview to question her regarding mail that was left at the post office box section. She overheard appellant ask why she was being called in. Ms. Lan advised appellant that she was there for "just cause" questioning in regard to the mail. Appellant became upset and Ms. Pace heard appellant arguing with Ms. Lan as the supervisor

tried to explain why she was questioning her. She became loud and seemed concerned with other employees knowing that she was called to the office. Appellant loudly questioned why she was the only one being called to the office. Ms. Pace left her office to assist because appellant was out of control and Ms. Lan was not able to handle the situation. She explained to appellant that the “just cause” interview was an investigation to find out what happened but did not mean that she had done anything wrong. Ms. Pace informed appellant that she need only answer the supervisor’s questions and she would be provided with a written copy. However, appellant argued that the supervisor had no right to hold a “just cause” interview and that she was not the only clerk that handled the post office box mail. After several attempts to get appellant to follow instructions, Ms. Lan ended the “just cause” inquiry but appellant continued to argue with her, saying that Ms. Lan was not doing her job properly and did not have the right to call her to her office. Ms. Pace explained that she met with a clerk representative, who immediately informed appellant that she needed to “stop the arguing with her coworkers, learn to communicate with others and not tell others what to do or tell other employees that they are going to get fired because they are on limited duty.” She informed appellant that she needed to follow supervisory instructions. Ms. Pace noted that, in the past, supervisors had scheduled appellant in a sporadic fashion as she was not full time. She had to tell appellant on several occasions to listen to her supervisors and not argue, but follow instructions. Ms. Pace stated that appellant was “confused” to “believe that she oriented Ms. Lan and me.”

Regarding the December 31, 2009 incident, Ms. Pace noted that, at the end of the day, there were two window clerks. She stated that appellant was asked to lock the lobby doors at 5:00 p.m. to avoid one of the window clerks having to leave a window and lock the door at a crucial time. Ms. Pace explained that she happened to be observing the operation, and saw that appellant was looking at her clock around 4:50 p.m. She walked out to the lobby area at 5:00 p.m. and thought that appellant was coming to lock the doors; however, Ms. Pace noted that appellant walked to the back of the building resulting in one of the window clerks leaving a customer at the counter to lock the door. She asked appellant “what was the problem?” Ms. Pace denied yelling at appellant, who replied: “I don’t know what my job duties are.” She advised appellant that her “job duties are the same instructions that you have always been doing.” Ms. Pace indicated that appellant wanted to argue about her job duties and that Ms. Pace walked away. She noted that, after things settled down, she tried to speak with Ms. Lan and appellant to set things straight about job duties but she had to end the meeting as appellant believed that she did an excellent job and her work could not be questioned.

On January 14, 2010 appellant indicated that Ms. Lan accused her of not following instructions for reporting to work. Ms. Pace explained that, while speaking with the three supervisors, they determined that appellant had clocked in early on occasion. When questioned by Ms. Lan, appellant stated that she had received permission from Ms. Shelton to arrive at that time. Ms. Pace stated that this was not true and that Ms. Lan advised appellant that she was being put on notice not to clock in early. It was subsequently determined that appellant had clocked in early and was seen going back to her car. Appellant was informed that this was falsification. Ms. Pace stated that the decision was made during the last month of appellant’s appointment to terminate her due to the unprofessional conduct and repeated refusal to follow instructions.

By decision dated February 24, 2012, OWCP denied appellant's claim. It found that appellant's emotional condition did not arise out of the performance of her job duties.

Appellant's representative requested a hearing, which was held on June 15, 2012. At the hearing, appellant repeated her allegations. She asserted that she was terminated because of her EEO activity. Appellant explained that on January 14, 2010 she asked Ms. Lan for the EEO telephone number because she was being harassed. She denied that she falsified her time or went to her car after clocking in. Appellant stated that she was given a 5:00 a.m. start time and referred to a supporting witness statement. She denied failing to follow instructions.

By letter dated June 27, 2012, addressed to appellant and the employing establishment, OWCP requested comments regarding the hearing. The employing establishment did not respond.

In a July 13, 2012 letter, appellant's representative contended that appellant's supervisors erred or were abusive toward appellant. He questioned the veracity of Ms. Lan and Ms. Pace, contending that Ms. Edwards confirmed that all morning clerks scanned incoming parcels and that their tours began at 5:00 a.m. Appellant's representative noted that Ms. Heffington-Hall explained what happened on December 31, 2009 with regard to locking the lobby door. He contended that the employing establishment had retaliated against appellant as she had requested an EEO counselor's telephone number before being dismissed by Ms. Lan on January 14, 2010. Appellant's representative asserted that Ms. Lan was untruthful in EEO testimony, referring to her answers in EEO interrogatories. He stated that Ms. Lan told appellant to report to work the next day, while simultaneously stating that she had made a decision the prior day to release appellant. Appellant's representative claimed that the EEO investigator's report, which included a copy of the list of clerk duties, did not include locking of any doors. He also included copies of appellant's performance evaluations for the previous four years which were positive. The investigator noted a positive statement from Donna Dorn, dated January 16, 2010, who indicated that appellant was hard working and conscientious. Appellant's representative contended that management's claims were not credible as the statements from the supervisors were inconsistent and contradictory.

OWCP received a March 2, 2012 order from an EEO administrative judge advising that a hearing was scheduled for March 20, 2012 and providing a list of accepted witnesses. Attached to this were answers to interrogatories, including a sworn affidavit from Ms. Pace who addressed appellant's concerns as listed in her February 22, 2012 statement. In a May 24, 2010 affidavit, Ms. Lan advised that it was her decision to terminate appellant before she requested the telephone number for EEO and her full name. She stated that appellant contacted her sometime between noon and 3:00 p.m., for about five minutes after she was separated. OWCP also received an April 28, 2010 affidavit from Ms. Lan who noted that on December 29, 2009 the reason for appellant's just cause interview was for failure to follow instructions. Ms. Lan stated that appellant had not finished her mail assignment and went to lunch.

In an October 11, 2007 statement, Arnold Christian, a supervisor of distribution operations, noted that appellant was under his supervision for approximately two years and had excellent work habits and good attendance. Appellant had never had any accidents and the quality and quantity of her performance was always remarkable. She got along with other

employees and management. In a January 16, 2010 statement, Ms. Dorn, a customer services supervisor, stated that appellant was very hardworking and conscientious and was helpful with providing ideas to streamline operations.

In an August 29, 2012 decision, an OWCP hearing representative affirmed the February 24, 2012 decision.

LEGAL PRECEDENT

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 his or her regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁴ 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 his or her frustration from not being permitted to work in a particular environment or to hold a particular position.

The Board has held that with regard to administrative or personnel matters, actions by a supervisor or manager are not compensable unless the evidence establishes error or abuse.⁵ In considering whether employing establishment personnel erred or acted abusively, the Board has examined whether they acted reasonably.⁶

An employee has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition, for which he or 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, OWCP 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, OWCP should then determine whether the evidence of record substantiates that

⁴ *Lillian Cutler*, 28 ECAB 126 (1976).

⁵ *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

⁶ *See Charles D. Edwards*, 55 ECAB 258 (2004).

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).

factor. When the matter asserted is a compensable factor of employment and the evidence of the matter establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.¹⁰

ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of several incidents involving her supervisors. The Board must review whether the alleged incidents and conditions of employment are compensable employment factors under the terms of FECA. Appellant has not attributed her emotional condition to the regular or specially assigned duties of her position as a casual mail clerk. Therefore, she has not alleged a compensable factor under *Cutler*.¹¹

Appellant alleged error by her supervisors related to administrative and personnel actions. In *Thomas D. McEuen*,¹² the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA 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. The Board noted, however, that coverage under FECA would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by management in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the supervisors have acted reasonably.¹³

Appellant alleged that on December 29, 2009 she was given a just cause interview by Ms. Lan for failure to follow instructions. She contended that she did not fail to follow instructions. Ms. Lan stated that the interview was based on the fact that appellant had not completed her mail assignment before going to lunch. She stated that appellant's attitude during the interview was rude and disrespectful. Ms. Pace stated that she overheard the conversation and appellant arguing with Ms. Lan. She went to Ms. Lan's office to explain the purpose of the just cause interview and informed appellant that she need only answer her supervisor's questions. After several attempts to get appellant to follow instructions, Ms. Lan ended the interview. Ms. Pace noted that she continued to argue with her supervisor.

Based on the evidence of record, the Board finds that appellant has not submitted sufficient evidence to establish her allegations of administrative error or abuse in the December 29, 2009 just cause interview meeting. Appellant did not substantiate her allegation that she was instructed by Ms. Lan to go home before finishing casing her assigned box mail. She made general reference to witness statements concerning her character and noted a 10-year history of positive performance evaluations. Appellant provided an October 11, 2007

¹⁰ *Id.*

¹¹ *See supra* note 4.

¹² *See supra* note 5.

¹³ *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

recommendation from a former supervisor, Arnold Christian, who noted generally that she followed instructions. The Board notes that this statement is not relevant to appellant's allegations of error or abuse during the period December 29, 2009 to her termination on February 26, 2010. It was written prior to the incidents alleged by appellant as causing her emotional condition and he was not witness to any specific incident alleged. It is well established that investigations are an administrative function of the employing establishment and not related to an employee's day-to-day duties or specially assigned duties.¹⁴ Management retains the right to investigate an employee as part of an evaluation process and the employee's fear of being investigated is not compensable absent evidence of error or abuse.¹⁵ Appellant has not substantiated her allegations.

Appellant alleged that on December 31, 2009 Ms. Pace spoke to her very loudly in front of her coworkers and customers for failing to lock the lobby door, which caused her embarrassment. She provided a September 10, 2010 statement from Ms. Heffington-Hall, who was at work at the window on December 31, 2009 and had locked the lobby door based on light volume. She stated that she heard Ms. Pace yell from the back of the office, "Why aren't you locking the doors?" Appellant then came from the breakdown/dispatch area as instructed and found out Ms. Heffington-Hall had already locked the door. She noted that Ms. Pace went to the front and yelled, "You mean Pamela had to lock the door?" Ms. Heffington-Hall stated that she was by then in the middle of a transaction with a customer and that appellant monitored the door to let the last customers out that evening.

The Board has recognized that verbal altercations or verbal abuse may give rise to compensability under FECA when sufficiently detailed by a claimant and supported by the record.¹⁶ This does not imply, however, that every statement uttered in the workplace will give rise to coverage. The mere fact that an employee or a supervisor may raise his or her voice does not warrant the findings of verbal abuse.¹⁷ The Board finds that the statement of Ms. Heffington-Hall is not sufficient to establish verbal abuse by Ms. Pace on December 31, 2009. The record reflects that Ms. Pace initially raised her voice from a back office room, inquiring whether the doors had been locked that evening. While Ms. Pace raised her voice in making her inquiries, the evidence reflects that her concern was an administrative matter; whether the door had been properly secured. The language attributed to Ms. Pace was not crude, obscene or otherwise demeaning. The evidence of record does not establish verbal abuse. Appellant has not established a compensable factor as to this allegation.

Appellant's representative contended that locking the door was not one of appellant's duties. This contention pertains to whether Ms. Pace improperly modified appellant's work assignments as a casual clerk. Appellant also alleged mismanagement by Ms. Lan and Ms. Pace,

¹⁴ See *Jeral R. Gray*, 57 ECAB 611 (2006).

¹⁵ *Id.* See also *David C. Lindsey, Jr.*, 56 ECAB 263 (2005) (the Board has characterized supervisory discussions of job performance and reprimands as administrative matters that are compensable only when the evidence shows error or abuse by management).

¹⁶ See *C.S.*, 58 ECAB 137 (2006); *Peter D. Butt, Jr.*, 56 ECAB 117 (2004).

¹⁷ See *Joe M. Hagewood*, 56 ECAB (2005); *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

noting that her work assignments and schedules were monitored, that her duties were modified on occasion, that the starting time of her shift was changed and that she was improperly disciplined.¹⁸ As noted, these allegations pertain to administrative and personnel matters that, absent of error or abuse, are not compensable factors of employment.¹⁹ The fact that appellant was assigned to lock doors on occasion that may have been the duty of another employee, is not proof that her supervisor acted erroneously in assigning her duties.²⁰ The Board finds that the evidence of record is not sufficient to establish error or abuse by appellant's supervisors in these administrative and personnel matters.

The record reflects that appellant filed an EEO complaint contending that her termination in February 2010 was retaliation by her managers. The Board notes that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.²¹ The term "harassment" as applied by the Board is not the equivalent of such term as defined by other agencies, such as the EEO Commission, which is charged with statutory authority to investigate and evaluated such matters in the workplace. Under FECA, the term harassment is generally synonymous with a persistent disturbance, torment or persecution, *i.e.*, mistreatment of an employee by coworkers or supervisors.²² The Board does not have jurisdiction over appellant's claim of retaliation in her discharge from work, as that is a matter for determination by the EEO Commission under its statutory authority.

Appellant submitted documents pertaining to her EEO claim consisting of certain interrogatories and witness affidavits from Ms. Lan and Ms. Pace. The Board notes that this evidence is not sufficient to establish appellant's allegations of harassment by her supervisors. The record reflects that an administrative judge scheduled the matter for a hearing and set forth a list of witnesses; but there is no evidence as to any final determination by the EEO Commission on appellant's claim of retaliation or allegations of harassment. Based on the evidence currently of record, the Board finds that appellant has submitted insufficient evidence to substantiate her allegations of harassment by Ms. Lan or Ms. Pace.

CONCLUSION

The Board finds that appellant has not established that she sustained an emotional condition causally related to factors of her federal employment.

¹⁸ Appellant's statement of October 10, 2011 acknowledged that she occasionally arrived early to work. Ms. Pace noted that appellant was counseled about her work shift.

¹⁹ The assignment of work is an administrative function of a supervisor. *Jeral R. Gray, supra* note 14.

²⁰ See *Beverly R. Jones*, 55 ECAB 411 (2004). (The employee was assigned to a vending job that she did not like. The Board found insufficient evidence to establish error or abused in the assignment of work by her supervisor).

²¹ See *James E. Norris*, 52 ECAB 93 (2000).

²² See *V.W.*, 58 ECAB 428 (2007).

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 10, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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