U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CONSTANCE I. GALBREATH and U.S. POSTAL SERVICE, POST OFFICE, Phoenix, Ariz.

*Docket No. 95-149; Submitted on the Record;*
*Issued March 13, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim for an emotional condition.

On February 27, 1990 appellant, then a 42-year-old injury compensation supervisor, filed a traumatic injury claim alleging that on February 23, 1990 she was "verbally attacked, abused and humiliated" by Wayne H. Garrison, Field Director for Human Resources, during a two-hour meeting pertaining to her job performance duties. She sought medical treatment from Dr. Marlene Shiple, a psychologist, on February 27, 1990, and stopped work on February 28, 1990.

The employing establishment controverted appellant's claim. Patricia A. Trevena, appellant's acting supervisor, was listed as a witness to the February 23, 1990 meeting. Ms. Trevena stated that the meeting was called to discuss appellant's performance, noting:

> "During that discussion, he was called out to meet with the GM/Postmaster and was gone approximately 45 minutes; therefore, the meeting with [appellant] lasted approximately 1 hour and 15 minutes. As he discussed her performance and expectations, [appellant] was very defensive and cried at times. (People who know [her] realize she cries easily.) Mr. Garrison would wait for her to stop crying; then he would proceed. This was a normal routine discussion. There was no strong language or finger-pointing or gestures made. In my opinion, Mr. Garrison was calm and handled this discussion very professionally.
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> "This was a positive counseling session. During this session, [Mr. Garrison] mentioned the class he had planned on sending [appellant] to for 16 hours to assist her in managing her employees better. [Appellant] informed him that the class was canceled at this time; will be given again in April. Mr. Garrison praised her for the work she had performed in the past on the rehab[ilitation] program.

> He offered her assistance/support in whatever she needed to get the Injury Compensation Unit functioning properly again. When [appellant] indicated that she did not understand what Mr. Garrison was talking about or what he wanted, he would give her examples or make suggestions as to what she could do to correct the deficiencies. He assigned Terry Hemmen specific functions to do and had him reporting to him rather than to [appellant] so she would have more time to devote to her job and her section. At no time during the discussion did Mr. Garrison raise his voice or lose his temper with her. Her crying spells were sporadic and most of the time she was in complete control."

Mr. Garrison submitted a March 2, 1990 statement in which he noted that the purpose of the meeting was to discuss appellant's failure to follow his directions with regard to excessive time she was spending with an employee detailed under her supervision. He noted that he had three prior discussions with appellant on this matter and advised that he was removing the detailed employee from her immediate supervision. Mr. Garrison stated that he then discussed aspects of her job performance which he found deficient. He noted that she was defensive during the meeting and had several crying spells, but indicated that she was in control and able to direct counter arguments.[1]

The record contains an August 2, 1990 conference memorandum between appellant and an Office senior claims examiner. Appellant stated that she had worked with Mr. Garrison since November 1989 and had met with him on an average of once a week. She alleged that she had not received any criticism or indication of a deficiency in her job performance prior to the February 23, 1990 meeting. She alleged that the meeting lasted two and one-half hours and that she started to cry about 15 minutes into the meeting and throughout the remainder of the meeting. Appellant denied that she had any prior emotional condition and attributed her emotional condition solely as a reaction to the February 23, 1990 meeting.[2]

In a second conference memorandum of September 20, 1990, appellant refuted statements attributed to her by two of her employees, who stated that she admitted seeking medical attention for an emotional condition prior to the February 23, 1990 meeting. The Office claims examiner found that the medical evidence and leave records did not reveal any prior treatment for an emotional condition and that the claim was traumatic in nature. The claims examiner noted that the Office accepted the following as factual: (1) on February 23, 1990 a meeting took place at which appellant, Ms. Trevena and Mr. Garrison were present; (2) during

[1] In a May 2, 1990 response to the employing establishment's controversion of her claim, appellant contended that her claim was traumatic in origin as a reaction to the February 23, 1990 meeting and that there was no misconduct on her part. Appellant cited to *Stanley Smith, O.D.*, 29 ECAB 652 (1978), in support of her contention that she was not required to show harassment during the February 23, 1990 meeting, only that her reaction arose directly from the meeting.

[2] The record reveals appellant was issued a Letter of Warning on February 28, 1990. She subsequently brought an Equal Employment Opportunity (EEO) action alleging discrimination based on sex, age and religion. On March 9, 1993 a settlement agreement was entered between appellant and the employing establishment in which the parties agreed that the settlement agreement would not constitute an admission of any wrongdoing or discrimination in any other proceeding or litigation.

the course of the meeting Mr. Garrison advised appellant of several areas of her work in which he perceived her to be deficient; (3) the meeting lasted for two and one-half hours, during which Mr. Garrison was absent for 45 minutes and no discussion took place; and (4) during the course of the meeting appellant cried repeatedly. Citing to *Stanley Smith*, the claims examiner noted that appellant was not required to show that her supervisor's actions constituted harassment or were improper, as long as she could establish that her disability arose directly from her experience of them and reaction to them.

By decision dated September 21, 1990, the Office accepted appellant's claim for a traumatic adjustment reaction.

By letter dated December 10, 1990, the Office advised appellant that her case was undergoing a review, and that a current medical report was needed from her treating physician.

By letter dated December 13, 1990, the employing establishment requested that the Office require another medical evaluation of appellant as she had refused two fitness-for-duty examination requests made by the employing establishment and as Dr. Shiple had stated in a November 1, 1990 letter that any fitness-for-duty type-examinations would be detrimental to appellant's therapy and recovery progress.

By report dated March 7, 1991, Dr. Otto L. Bendheim, a Board-certified psychiatrist selected to provide a second opinion examination, opined that appellant was still suffering from a depressive reaction "aggravated and precipitated by the injury on February 23, 1990." He further opined that appellant was recovering well and could return to work in another work setting away from Mr. Garrison.

Pursuant to Dr. Bendheim's report, the employing establishment offered appellant another position which was found to be unsuitable by appellant's attending clinical psychologist, Dr. Richard F. Wurtz, who opined that any position within the employing establishment would be unsuitable as any such position would cause an exacerbation of her symptoms.

In a letter to the Office dated April 6, 1992, Dr. Bendheim reiterated that he believed that appellant could return to work in another facility on another shift as long as she would not be under the supervision of Mr. Garrison.

By report dated May 5, 1992, Dr. Wurtz expressed his disagreement with Dr. Bendheim's opinion and reiterated that he believed appellant could not return to the employing establishment for reemployment. He noted that appellant was now taking antianxiety and antidepressant medications for worsening emotional symptoms and panic attacks as a result of the employing establishment's continued efforts at "extreme intimidation and harassment" in its attempts to contact her and to return her to work. In a March 24, 1992 work restriction evaluation, Dr. Wurtz indicated that appellant remained disabled and could only perform two hours of academic rehabilitation a day.

On January 14, 1994 the Office issued appellant a notice of proposed termination of compensation. In an attached January 10, 1994 memorandum, an Office senior claims examiner

stated that he was reopening the claim under section 8128, noting that under *Kevin J. McGrath*,[3] the Office maintained the burden of showing that the initial decision to accept the claim was in error. The senior claims examiner noted that appellant's claim had been accepted based on her allegation of harassment at the February 23, 1990 meeting but that there was no evidence that a fact finder had ever made a finding of harassment based on the evidence submitted to the record. Citing *Pamela R. Rice*,[4] the senior claims examiner noted that the Office was required to determine whether appellant's allegations of harassment by Mr. Garrison constituted a factor of employment which would be covered under the Federal Employees' Compensation Act. The senior claims examiner found that the February 23, 1990 meeting was called to discuss appellant's job performance, which was an administrative function, and that on February 28, 1990 she was issued a Letter of Warning. The senior claims examiner found that there was no evidence of record to establish agency error or abuse in these administrative actions. It was noted that Ms. Trevena stated that she witnessed the meeting and considered the discussion to be a normal and routine job performance evaluation and that Mr. Garrison had used no strong language and handled the meeting professionally. The senior claims examiner found no evidence to support appellant's allegations that she was verbally attacked, harassed, abused or humiliated by Mr. Garrison on that date.

By report dated January 24, 1994, Dr. Wurtz reiterated his opinion that appellant's condition was caused by "one single outrageous, humiliating and abusive encounter with Mr. Garrison on February 23, 1990."

By decision dated March 7, 1994, the Office terminated appellant's compensation effective March 6, 1994 finding that her emotional condition did not arise out of her federal employment.

By letter dated March 7, 1994, received by the Office on March 9, 1994, appellant objected to the proposed termination of her compensation and cited several instances of the employing establishment's error and abuse with respect to administrative matters. Appellant argued that she performed in an outstanding manner for years prior to the alleged February 23, 1990 incident; that Mr. Garrison sought to make people believe that something improper was going on between her and a male coworker without basis and that this was abusive; that there was no documented problem with her work and therefore to say he was discussing her deficiencies was abusive; and that she was issued an unjustified Letter of Warning, which was grieved and removed, and that this was abusive. Appellant also alleged that proof of abuse by Mr. Garrison was that coworkers had never seen her so upset as after the February 23, 1990 meeting.

In a letter dated March 28, 1994, appellant requested reconsideration, noting that her response to the proposed termination had not been considered before the Office issued its final termination decision. Appellant restated that her allegations of harassment were not mere perceptions but were supported by evidence of her distress and an Equal Employment

[3] 42 ECAB 109 (1990).

[4] 38 ECAB 838 (1987).

Opportunity Commission (EEOC) ruling overturning the Letter of Warning. Appellant alleged that her EEO complaints were *prima facie* documentation of abuse. Appellant also challenged the Office's characterization of the histories given by appellant to her medical providers as inaccurate.

By decision dated June 9, 1994, the Office denied modification of the March 4, 1994 decision. The Office noted that its acceptance of appellant's claim had been based solely upon her general allegations of what occurred at the February 23, 1990 meeting. The Office found that the claim was rescinded on the basis of consideration of the new legal argument that the circumstances alleged to have occurred during the meeting were not factually established. The Office noted that it had only accepted four facts pertaining to the February 23, 1990 meeting and that there was no evidence submitted which demonstrated that the employer acted abusively in its dealing with appellant. Therefore, the medical evidence which attributed appellant's emotional reaction to the February 23, 1990 meeting were not based on an accurate history of what occurred.

The Board finds that the Office met its burden to terminate appellant's compensation by rescinding its acceptance of her claim for an employment-related emotional condition.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[5] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award of compensation can only be set aside in a manner provided by the compensation statute.[6] It is well established that once the Office accepts a claim for compensation, it has the burden of justifying termination or modification of compensation benefits.[7] This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.[8]

On September 21, 1990 the Office accepted that appellant sustained a traumatic adjustment reaction following the February 23, 1990 meeting with Mr. Garrison. In doing so, the Office found that a meeting was held on that date with Mr. Garrison, that appellant's performance was discussed, that the meeting lasted for two and one-half hours, and that during the course of the meeting appellant cried. The Office failed to adjudicate or make any factual findings as to whether the allegations of harassment or abuse appellant made concerning the conduct of Mr. Garrison were supported by probative evidence.

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[5] *See* 5 U.S.C. § 8128; *Eli Jacobs*, 32 ECAB 1147 (1981).

[6] *Shelby J. Rycroft*, 44 ECAB 795 (1993).

[7] *See Frank J. Meta, Jr.*, 41 ECAB 115 (1989); *Harold S. McGough*, 36 ECAB 332 (1984).

[8] *Laura H. Hoexter*, 44 ECAB 987 (1993); *Alphonso Walker*, 42 ECAB 129 (1990); *petition for recon. denied*, 42 ECAB 659 (1991); (*Nicholas P. Hoexter*) *Beth A. Quimby*, 41 ECAB 683 (1990).

In this regard, appellant contends that evidence to support proof of the fact of harassment occurring during the February 23, 1990 meeting is irrelevant to her claim, citing to *Stanley Smith.* In *Smith,* the Board stated:

> "There are cases where the employee has alleged that the employment situation which caused his emotional reaction included actions taken by his superiors which the employee described as constituting harassment. Generally speaking, the issue in such cases is not whether, in fact, there was harassment but whether the employee's disabling emotional reaction was 'precipitated or aggravated by the conditions of the employment.'"[9]

The Board notes, however, that both before and after the *Smith* decision it has reviewed the evidence of record to make a determination on the factual question of whether a claimant has been harassed by a superior or coemployee. In *Carl R. Lyons*,[10] the Board found that statements from two supervisors and two fellow employees did not support the claimant's allegations that he was harassed in the workplace.[11] Similarly, in *Pamela R. Rice*,[12] the Board in applying *Smith* reiterated that, "[a]ctions of an employee's supervisor which the employee characterizes as harassment can constitute factors of employment giving rise to coverage under the Act, and *the Board's function in such cases is to determine whether the evidence establishes that the supervisor's actions contributed to the employee's disabling reaction.*"[13] (Emphasis added.) The Board reviewed the evidence submitted by the claimant and noted that while her statements generally implicated situations which could give rise to coverage under the Act, she did not establish factually that the implicated incidents actually occurred as alleged. In making this determination, the Board reviewed the interviews conducted with the claimant's coworkers and supervisors.

More recently, the Board has reiterated that disputes and incidents alleged as constituting harassment can give rise to a compensable disability under the Act; however, there must be some evidence to establish that the acts alleged or implicated did, in fact, occur as mere perceptions of harassment or discrimination are not compensable.[14] The issue in such cases is not whether the

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[9] 29 ECAB at 656 (1978).

[10] 25 ECAB 170 (1974).

[11] *See, e.g., David Jones*, 22 ECAB 233 (1971) (the employee failed to substantiate his assertions respecting adverse working conditions); *Bernard S. Bailey, Jr.*, 20 ECAB 71 (1968) (the employee did not submit any evidence corroborating his allegations of harassment); *Piotr W. Gul*, 17 ECAB 599 (1966) (the employee did not substantiate his allegations of harassment); *Ann Goodwin*, 13 ECAB 188 (1961) (the employee did not factually support her allegations of unfair or discriminatory practices by her supervisors).

[12] 38 ECAB 838 (1987).

[13] *Id.* at 842.

[14] *See O. Paul Gregg*, 46 ECAB 624 (1995); *Elizabeth Pinero*, 46 ECAB 123 (1994); *Sandra R. Powell*, 45 ECAB 977 (1994); *Abe E. Scott*, 45 ECAB 164 (1993); *Anthony A. Zarcone*, 44 ECAB 751 (1993); *Ruth C. Borden*, 43 ECAB 146 (1991); *Kathleen D. Walker*, 42 ECAB 603 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990); *George Tseko*, 40 ECAB 948 (1989).

claimant has established harassment or discrimination under standards applied by the EEOC. Rather, under the Act, the issue is whether the claimant has submitted evidence sufficient to establish an injury in the performance of duty.[15] The standards for harassment or discrimination as defined by the EEOC do not represent the standard for claim adjudication under the Act, where the term harassment is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by employees or supervisors.

In the present case, on January 10, 1994 the Office senior claims examiner reopened the claim for review under section 8128(a). He noted that the claim had been accepted based on appellant's allegation of harassment but that there had been no adjudication on the factual question of whether the evidence of record supported appellant's contentions. Citing to *Pamela R. Rice*, among other case precedent, the senior claims examiner noted that the Office was required to make a factual determination concerning whether appellant was harassed during the February 23, 1990 meeting. He went on to review appellant's allegations of harassment and abuse, Mr. Garrison's statement concerning the meeting, and the statement of Ms. Trevena, a witness, who characterized the meeting as "a normal routine discussion" in which Mr. Garrison had acted professionally and had not engaged in strong language or finger pointing. The senior claims examiner found that appellant had not supported her allegations of harassment on February 23, 1990 with any substantive evidence. Rather, he credited Ms. Trevena's account of the meeting as support for Mr. Garrison's contention that he had not abused or humiliated appellant at the meeting.

The Board finds that the Office senior claims examiner properly applied section 8128(a) to reopen this claim and presented sufficient new legal rationale to support his determination that the issue of harassment had not been adjudicated.[16] The weight of the evidence of record concerning the February 23, 1990 meeting consists of the statement of Ms. Trevena. She does not provide any support for appellant's allegation that she was harassed or verbally attacked during the meeting by Mr. Garrison, as alleged. A claimant's own feeling or perception that a form of criticism or disagreement is unjustified, inconvenient or embarrassing is self-generated and does not give rise to coverage under the Act absent evidence that the interaction was, in fact, abusive. This principle recognizes that a supervisor or management in general must be allowed to perform their duties and that in the performance of such duties, employees will at times dislike actions taken. However, mere disagreement or dislike of a supervisory or management action will not be compensable without a showing through supporting evidence that the incidents or actions complained of were unreasonable.[17] For this reason, the fact that appellant may have

[15] *Michael Ewanichak*, 48 ECAB ___ (Docket No. 95-451, issued February 26, 1997).

[16] It is well established 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; *see Gregory J. Meisenburg*, 44 ECAB 527 (1993). The resolution of facts concerning working conditions is an Office adjudicatory function; *see Barbara Bush*, 38 ECAB 710 (1987).

[17] *See Daniel B. Arroyo*, 48 ECAB ___ (Docket No. 95-62, issued November 22, 1996).

cried at times during the meeting does not support or establish that her manager, Mr. Garrison, acted in an unreasonable manner.[18]

Appellant argued in a request for reconsideration that the employing establishment was guilty of administrative error and abuse as evidenced by her EEO claim and the removal of the Letter of Warning. The Board has held that grievances and EEO complaints, by themselves, do not establish workplace harassment or that unfair treatment occurred.[19] The evidence submitted on reconsideration establishes that appellant entered into an agreement with the employing establishment in which the parties mutually agreed to settle the matter. The settlement agreement indicates that all records related to disciplinary actions would be removed from appellant's records, all ratings in her records changed to "good," and a lump-sum payment of $5,500.00 (less taxes) be made in return for appellant's agreement to withdraw all administrative appeals before the EEOC and Merit Systems Protection Board and not to seek reemployment with the employing establishment. There is no documentation that the EEOC found prohibited discrimination based on age, sex, or religion as was alleged by appellant before that forum. Further, the parties agreed that entry into the settlement agreement would not constitute an admission to any wrongdoing by the employing establishment or by appellant that her allegations were without merit. Therefore, appellant's contention on appeal that the employing establishment "would not make these concessions unless they were in the wrong" is baseless and does not establish harassment, as alleged, in the February 23, 1990 meeting or error in issuance of the Letter of Warning.[20]

[18] The Board notes that in this case appellant has never attributed her emotional condition to any inability to perform her regular or especially assigned job duties; *see Lillian Cutler*, 28 ECAB 125 (1976).

[19] *Parley A. Clement*, 48 ECAB ___ (Docket No. 95-566, issued January 17, 1997).

[20] With regard to appellant's contention that *Burbank Jung*, 32 ECAB 249 (1980), supports her contention that an unfavorable performance appraisal and discussion is of sufficient relationship to the employee's duties so as to place it within the scope of coverage of the Act, the Board notes that in *Thomas D. McEuen*, 42 ECAB 566 (1991), the Board reviewed its case precedent pertaining to performance appraisals. The Board harmonized *Jung*, among other cases, noting that the case had been remanded for further evidentiary development, and that "coverage could be afforded, *depending on the evidence* ultimately developed. 42 ECAB at 573. (Emphasis added.) The Board stated that error or abuse in what would otherwise be a personnel matter will afford coverage under the Act. The Board noted that the decision to afford coverage turns "not on whether the performance rating was unsatisfactory *per se*, but on the fact the employer took some erroneous action that resulted in the employee's emotional reaction." 42 ECAB at 575.

The decisions of the Office of Workers' Compensation Programs dated June 9 and March 7, 1994 are hereby affirmed.

Dated, Washington, D.C.
March 13, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member