

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LATANYA M. COOPER and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Miami, FL

*Docket No. 98-146; Submitted on the Record;
Issued December 20, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant sustained an injury in the performance of duty on October 10, 1996.

On November 5, 1996 appellant, then a 32-year-old support clerk, filed a claim alleging that she sustained back injuries on October 10, 1996 due to a physical altercation with her supervisor, Jorge Hernandez. Appellant stated that, after the completion of an assignment, she was photocopying some documents for attachment to her file when she was approached by Mr. Hernandez who demanded that she surrender the photocopies and, when she refused, he, "with great force grabbed the papers with me holding on, dragging me from my left side to my right side." Appellant later stated that she "was photocopying information for her files so that [she] could document [her] diary/log against unfair accusations by [employing establishment] management." She asserted that she did not know of any written prohibition against making such copies. Appellant stopped work on November 7, 1996.

The employing establishment controverted the claim, alleging that appellant was not in the performance of duty when she was injured, as the cause of her injuries was her own willful misconduct. The employing establishment explained that Mr. Hernandez observed appellant photocopying sensitive taxpayer information and when he asked appellant what she was doing, she responded that she was making copies for her file to document that the assignment had been completed. Mr. Hernandez requested that appellant immediately surrender the sensitive information and when she refused his request, the "tug of war" over the documents ensued.

In a decision dated June 23, 1997, the Office of Workers' Compensation Programs rejected appellant's claim on the grounds that the evidence established that her injury did not occur in the performance of duty.

On June 14, 1997 appellant requested a review of the written record. By decision dated September 10, 1997 and finalized September 11, 1997, an Office hearing representative affirmed the June 23, 1997 decision rejecting appellant's claim.

The Board finds that appellant's injury on October 10, 1996 did not arise in the performance of duty.

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. It is not sufficient under general principles of workers' compensation law to predicate liability merely upon the existence of an employee-employer relationship.¹ Congress has provided for the payment of compensation for disability or death resulting from personal injury sustained while in the performance of duty. The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."²

"In the course of employment" deals with the work setting, the locale and the time of injury, whereas "arising out of the employment" encompasses not only the work setting, but also a causal concept, the requirement being that an employment factor caused the injury.³ In the compensation field, it is generally held that an injury arises out of and in the course of employment when it takes place (a) within the period of employment, (b) at a place where the employee may reasonably be expected to be in connection with the employment, (c) while he is reasonably fulfilling the duties of the employment or engaged in doing something incidental thereto, and (d) when it is the result of a risk involved in the employment or the risk is incidental to the employment or to the conditions under which the employment is performed.⁴

In *Soo F. Dong*⁵ an employee sustained injuries during an altercation with employing establishment security guards on the employment premises. An investigation revealed the employee did not present proper identification to gain admission to the employment premises, and when she was again asked to comply with the appropriate identification procedures, rather than provide the requested identification, she became disruptive and began to strike at the security guards with a shoe. The Board noted that, at the time of the injury, the employee had reached the premises of the employing establishment and, therefore, the employee had made a *prima facie* showing that her injury had occurred in the performance of duty.⁶ The Board noted,

¹ *George A. Fenske*, 11 ECAB 471 (1960).

² *Timothy K. Burns*, 44 ECAB 291 (1992); *Jerry L. Sweeden*, 41 ECAB 721 (1990); *Christine Lawrence*, 36 ECAB 422 (1985).

³ *Larry J. Thomas*, 44 ECAB 291 (1992).

⁴ See *Carmen B. Gutierrez (Neville R. Baugh)*, 7 ECAB 58 (1954); *Harold Vandiver*, 4 ECAB 195 (1951).

⁵ 47 ECAB 800 (1996).

⁶ *Id.* at 802.

however, that, at the time of her injury, the employee was engaged in an act of willful misconduct which under the Federal Employees' Compensation Act, precluded compensation as such conduct "removed her from the performance of duty and any duty status she may have acquired by entering upon the premises of the employing establishment."⁷

In the present case, it can be said that appellant has made a similar *prima facie* showing that her injury occurred during an altercation while on the premises of the employing establishment. However, the Office has invoked the affirmative defense of willful misconduct in the adjudication of her claim for compensation.

Section 8102(a) of the Act provides in pertinent part, as follows:

"The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, unless the injury or death is --

(1) caused by willful misconduct of the employee...."⁸

In reviewing claims in which the Office invokes an affirmative defense under section 8102, the Board has held that the Office's use of an affirmative defense such as willful misconduct must be invoked in the original adjudication of the claim.⁹ In this case, the Board notes that the Office properly invoked the affirmative defense of willful misconduct on November 19, 1996 in conjunction with the original adjudication of appellant's claim. Chapter 2.804.13(a) of the Office's Federal Procedure Manual, then provided:

"Willful Misconduct, Intoxication or Intention to Bring About Injury or Death to Self or Another. Where the questions of 'fact of injury' and 'performance of duty' are decided affirmatively, consideration must also be given to the question of whether the injury or death was caused by the willful misconduct of the employee...."¹⁰

In this case, as in *Dong*, the Office conducted an investigation into the circumstances surrounding the October 10, 1996 incident and determined that the evidence of record established that appellant engaged in activities which constituted willful misconduct when she made photocopies of sensitive taxpayer information for her own personal use, in direct violation of the employing establishment's *Rules of Conduct* as it pertains to taxpayer privacy. The record contains documents signed by appellant in which she affirmed that she had received the *Rules of Conduct* and understood its obligations. The accounts of the eyewitnesses to the altercation

⁷ *Id.* at 803-04.

⁸ 5 U.S.C. § 8102(a)(1).

⁹ *Soo F. Dong*, *supra* note 5; *Gayle M. Petty*, 46 ECAB 996 (1995); *see Bruce Wright*, 43 ECAB 284 (1991); *Paul Raymond Kuyoth*, 27 ECAB 253 (1976), *reaff'd on recon.*, 27 ECAB 498 (1976).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.14(a) (August 1994).

support that rather than surrendering the copied documents to her supervisor, Mr. Hernandez, when asked, she engaged in a “tug of war” with Mr. Hernandez over the documents. The Board finds that appellant’s willful misconduct removed her from the performance of duty and any duty status she may have acquired by entering upon the premises of the employing establishment.

The decision of the Office of Workers’ Compensation Programs dated September 10, 1997 and finalized on September 11, 1997 is hereby affirmed.

Dated, Washington, D.C.
December 20, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member