

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TAMMY A. NESMEYER and DEPARTMENT OF THE ARMY,
ARMY NATIONAL GUARD, Jefferson City, MO

*Docket No. 00-2371; Submitted on the Record;
Issued October 4, 2001*

DECISION and ORDER

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

The issue is whether appellant sustained an emotional condition in the performance of duty.

On February 11, 1999 appellant, then a 32-year-old production controller, filed a claim for occupational stress that she attributed to her immediate supervisors continually harassing her. Appellant provided statements describing the specific incidents and conditions of her employment, to which she attributed her condition and medical reports addressing her condition, diagnosed as major depression of moderate severity on March 5, 1999 and its relationship to her employment. In response to a request from the Office of Workers' Compensation Programs appellant's shop superintendent submitted a statement dated April 1, 1999, addressing appellant's allegations.

By decision dated July 13, 1999, the Office found that appellant had not substantiated any compensable factors of employment.

By undated letter received by the Office on January 18, 2000, appellant requested reconsideration and submitted additional evidence, including a log of incidents, an agreement dated April 16, 1999, settling a grievance filed by appellant and a statement from a coworker.

By decision dated April 14, 2000, the Office found that appellant had not substantiated any compensable factors of employment.

The Board finds that the case is not in posture for a decision.

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 his regular or specially assigned work duties or to a requirement imposed

by the employment, the disability comes within the coverage of the Federal Employees' Compensation 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 his frustration from not being permitted to work in a particular environment or to hold a particular position.¹

Many of appellant's allegations concern administrative or personnel matters of the employing establishment, which are not covered under the Act unless error or abuse is shown. Generally, 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. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.²

Appellant's complaint that a coworker rather than herself was asked about going to administrator school concerns the employing establishment's decision on giving training, which is an administrative matter.³ Appellant also complained about the employing establishment's delay in granting a requested desk audit, but has not shown error in such delay, especially in light of the shop superintendent's belief that this audit would more likely result in a downgrade in appellant's position rather than the upgrade appellant anticipated.⁴ Appellant also has not shown error in the employing establishment's denial of her request for a change in work hours on April 10, 1997, or in the one-week delay in granting her April 26, 1994 request for leave without pay for annual training.

However, appellant's allegation that she and a coworker were given insufficient time to complete a questionnaire for the audit scheduled for October 14, 1998 is corroborated by a coworker. When the desk audit was rescheduled for December 7, 1998, appellant was provided with the questionnaire two weeks before the scheduled audit. In a December 14, 1999 statement, the former chief steward for appellant's union stated that she received a telephone call from appellant and her coworker on October 13, 1998 between 9:30 and 10:00 p.m. stating that they had worked on the questionnaire for over 12 hours but had not yet completed it. The steward stated that she later found out that the questionnaire should have been enclosed with the notice of the audit, that she attempted to reschedule the audit, that the auditor appeared the next morning and that the audit was rescheduled through a higher ranking officer. It was unreasonable for the employing establishment to provide an audit questionnaire requiring over 12 hours to complete to appellant the day before the scheduled audit and this establishes error by the employing establishment.⁵

¹ *Lillian Cutler*, 28 ECAB 125 (1976).

² *Michael Thomas Plante*, 44 ECAB 510 (1993).

³ *Lorraine E. Schroeder*, 44 ECAB 323 (1992).

⁴ The case record does not reflect the result of the desk audit.

⁵ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably. *Richard J. Dube*, 42 ECAB 916 (1991).

Appellant has also alleged that she was harassed by her immediate supervisor and the shop superintendent, in the form of yelling and cursing, during the incidents described above and on other occasions. The Board has held that actions of an employee's supervisor which the employee characterizes as harassment or discrimination may constitute factors of employment giving rise to coverage under the Act. However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions alone of harassment or discrimination are not compensable under the Act.⁶ The employing establishment was asked to comment on appellant's allegations and the shop superintendent, in his April 1, 1999 statement, did not deny that he yelled and cursed at appellant. Appellant submitted a January 5, 2000 statement from a coworker that she had witnessed appellant's immediate supervisor and the shop superintendent "cursing and yelling at [appellant] on several occasions." This coworker cited a specific example on July 23, 1998, when appellant entered the shop superintendent's office to ask about a desk audit and told him that she was offended by him playing a card game on his computer. The coworker stated that the shop superintendent told appellant "it was n[o]t any of her [g]od damned business and started yelling at her. This lasted about five minutes...." While appellant's dissatisfaction with perceived poor management is not covered under the Act,⁷ her reaction to being yelled and cursed at by her supervisors may constitute a compensable factor where supported by the evidence.⁸ The Office in its April 14, 2000 decision, discounted the statement of appellant's coworker on the basis that this coworker had also filed a claim for compensation. However, even if the coworker's statement is considered that of an interested party, it cannot be disregarded by the Office. The fact of interest may be taken into consideration in determining the weight to be given, but where evidence is clear, uncontradicted and unequivocal and nothing appears in such evidence or from other evidence which would tend to discredit it, the evidence does have probative value and if no impelling reason exists for disbelieving it, is sufficient to establish the fact which it is intended to establish.⁹ The coworker's account of the July 23, 1998 cursing and yelling is consistent with appellant's account of this incident and the case record contains no reason not to believe these accounts. Appellant alleged that she was cursed and yelled at on numerous other occasions, but has provided no corroboration that describes such incidents in detail, including dates, individuals involved and subjects of the discussions leading to the cursing and yelling. Other incidents of yelling and cursing, therefore, are not established. Where appellant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.¹⁰

Appellant has also cited another potentially compensable factor of employment: trying to meet the requirements of her position of production controller.¹¹ Appellant cited two incidents in

⁶ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁷ *Michael Thomas Plante*, 44 ECAB 510 (1993).

⁸ Verbal abuse, when sufficiently detailed and supported by the evidence of record, can constitute a compensable factor of employment. *Garry M. Carlo*, 47 ECAB 299 (1996).

⁹ *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

¹⁰ *Joel Parker, Sr.*, 43 ECAB 220 (1991).

¹¹ *Georgia F. Kennedy*, 35 ECAB 1151 (1984).

October 1995 when she was given 23 work orders 10 minutes before quitting time and 28 work orders 20 minutes before quitting time. Appellant, however, has not provided sufficient details regarding a September 10, 1998 incident, in which she heard that the shop superintendent accused her of leaving 20 minutes early. The April 16, 1999 agreement settling her grievance, though appearing to be favorable to appellant and requiring that her supervisors receive training in employee relations, does not establish error or abuse by the employing establishment.¹²

As appellant has identified and substantiated compensable employment factors, the Office must base its decision on an analysis of the medical evidence. As the Office found there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to the Office for this purpose.¹³ After such development as it deems necessary, the Office should issue an appropriate decision.

The April 14, 2000 and July 13, 1999 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, DC
October 4, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

¹² *Janet I. Jones*, 47 ECAB 345 (1996).

¹³ *See William P. George*, 43 ECAB 1159 (1992).